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**PART-TIME EMPLOYMENT  
IN BRITAIN AND JAPAN:  
A COMPARATIVE STUDY OF  
LEGAL DISCOURSE**

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## **ABSTRACT**

This study analyses the discursive construction of part-time employment and the workers in it in the employment and legal contexts in Britain and Japan, applying an analytical framework of the law developed from a post-structuralist feminist viewpoint. In doing this, this study contributes to knowledge in the field of legal studies by providing an account of the active role of the law in the area of employment, through the operation of discourse, in shaping and reshaping structural inequality which part-time women employees face in contemporary British and Japanese society.

Evidence for this study is collected from statistical data, questionnaires and interviews with managers, interviews with a group of ex-part-time women workers pursuing a legal case and the close reading of legal materials in the two countries. From the examination of these data, two discourses are identified, which circulate in employment and legal institutions in both countries and which help to produce the differentiation between full-time and part-time employees. One discourse emphasises differences in labour-related factors, such as working hours, job content and commitment, while the other emphasises differences in the gendered characteristics and domestic positions of men and women. I show that the two discourses operate within and across these institutions, constructing part-time employment as different from and inferior to full-time employment on both labour-related and gender-related grounds, and legitimising the disadvantaged position of part-time employees. This discursive construction has brought about a gendered hierarchy within the law in which the inferior working pattern of part-time employment is gendered as women's, while the superior pattern of full-time employment is gendered as men's.

On the basis of this analysis, I argue that the law is one of the most influential discursive mechanisms which bring about and help to sustain the hierarchical gendering of society, contributing to the production and reproduction of unequal power relations between the sexes and between employers and part-time women employees.

## **LIST OF ABBREVIATIONS**

### **Britain**

CA	Court of Appeal
EAT	Employment Appeal Tribunal
ECJ	European Court of Justice
ECR	European Court Reports
EOC	Equal Opportunities Commission
EqPA	Equal Pay Act
EPCA	Employment Protection (Consolidation) Act
ICR	Industrial Cases Reports
IRLR	Industrial Relations Law Reports
IT	Industrial Tribunal
QB	Queen's Bench
SDA	Sex Discrimination Act
WLR	Weekly Law Reports

### **Japan**

DWL	Law on Dispatched Workers
EEOL	Equal Employment Opportunity Law
Hanji	Hanrei-jiho (Law Reports Bulletin)
LDP	Liberal Democratic Party
LSL	Labour Standard Law
LWCCCL	Law on Leave from Work for Child Care
Minshu	Saiko-saibansho-minji-hanreishu (Supreme Court Civil Case Reports)
MWL	Minimum Wages Law
PEL	Law on Part-time Employees
Rohan	Rodo-hanrei (Labour-related Case Reports)
Rokeisoku	Rodo-keizai-harei-sokuho (Labour and Economy-related Case Reports Bulletin)
Romin	Rodo-kankei-minji-saiban-reishu (Labour-related Civil Case Reports)
TPSWHL	Temporary Law on Promoting Shorter Working Hours

### **International Organisations**

ILO	International Labour Organisation
OECD	Organisation for Economic Co-operation and Development

## LIST OF CASES

### Britain (EU)

- Clarke and Powell v. Eley (IMI) Kynoch Ltd [1982] IRLR 131  
Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland [1982] IRLR 333; [1984] IRLR 29  
Defrenne v. Sabena [1976] Case 43/75 Common Market Law Reports 98; ICR 547  
Ford v. Warwickshire County Council [1983] IRLR 126; 2 AC 71  
Foster v. British Gas plc [1991] 2 AC 306  
Handley v. H. Mono Ltd. [1978] IRLR 534  
Hofmann v. Barmer Ersatzkasse Case 184/83 [1984] ECR 3047  
Home Office v. Holmes [1985] 1 WLR 71  
ID Meeks v. National Union of Agricultural & Allied Workers [1976] IRLR 198  
Jenkins v. Kingsgate (Clothing Productions) Ltd (no.2) [1981] IRLR 388  
Kidd v. DRG (UK) Ltd [1985] ICR 405  
Lewis v. Surrey County Council [1986] IRLR 11, 455; [1987] IRLR 509  
Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] QB 401;  
R. v. Secretary of State for Employment, *ex parte* Equal Opportunities Commission [1994] 2 WLR 409  
R. v. Secretary of State for Employment, *ex parte* Seymour-Smith and Perez [1995] IRLR 464

### Japan

- Fuji-Jidosha-Gakko Case [1988] Rohan 528/61  
Fuji-Jukogyo Case [1965] Romin 16/2/256  
Heiankaku Case [1986] Rohan 480/535  
Hitachi-Medico Case [1987] Rohan 486/6  
Kochi-Hoso Case [1977] Rohan 268/17  
Nihon-Denki Case [1994] Rohan 640/55  
Nihon-Shokuen Case [1975] Minshu 29/4/456  
Nissan-Jidosha Case [1981] Hanji 998/3  
Osaka-Zosen Case [1989] Rohan 545/15  
Sanyo-Denki Case [1990] Rohan 558/44, [1992] Rohan 595/9  
Shunpudo Case [1967] Hanji 503/18  
Sumitomo-Cement Case [1966] Romin 20/4/715  
Tokyo-Sanso Case [1980] Rokeisoku 1045/9  
Toshiba-Yanagimachi-Kojo Case [1974] Minshu 28/5/927

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## **CHAPTER 1: INTRODUCTION**

The phenomenal expansion of part-time employment is one of the most striking social and economic developments particularly since the late 1960s, in both Britain and Japan. Part-time employment is now recognised as a distinctive characteristic of the current British and Japanese labour markets and a central feature of women's working lives in the two countries. The significance of part-time employment lies not only in its remarkable growth but also in its sex specificity and its much poorer working conditions compared with full-time employment. The concentration of women in this particular pattern of employment, therefore, raises questions of inequality between both men and women, and employers and employees as expounded in, for example, Walby (1986), Beechey and Perkins (1987), and Ueno (1990).

The position of women has changed considerably in both societies in the last few decades, as reflected in the large increase in married women's participation in the labour market as part-time employees, showing that the expansion of part-time employment is a crucial factor in the changing working patterns of women with families. In contrast, the majority of male workers have remained chiefly as full-time employees.<sup>1</sup> A striking corollary of these patterns is that remarkably little change has occurred in the domestic arena where the sexual division of labour persists. This means that women continue to carry domestic responsibility while participating in paid work.



Moreover, part-time women employees are a major source of more flexible and cost-efficient labour for employers in Britain and Japan, and the effective utilisation of these employees has proved to be of crucial importance for any business wishing to improve its competitiveness. On the other hand, employers usually assign part-time employees to underpaid, undervalued, and insecure positions with few prospects for promotion. As a result, a large number of women are clearly differentiated from full-time employees, have been shifted to the less privileged segment of the labour market and do not compete with the great majority of men in full-time employment.

In both Britain and Japan, governments and employers repeatedly emphasise that part-time employment is advantageous to women since it enables them to combine domestic responsibility and paid work. According to this view, it is women's free choice to participate in part-time work that is largely responsible for the growth of the part-time labour market. I would suggest, however, that the idea of women's choice is made to bear too much weight in the explanation of the growth of part-time work. The benefits of part-time employment to employers and to men as marital partners and more privileged workers suggest that there is more to the understanding of part-time employment than women's individual choice.

Industries in both Britain and Japan need women's labour. First, although the current economic climate has greatly eased the fear of labour shortage in the two countries, there is still a long-term prospect of labour shortage caused by the changing composition of the population. It is predicted that in 2040, 32 per cent of

the entire population in Britain and only 20 per cent in Japan will be of working age under 65 in comparison to 46 per cent and 56 per cent in 1995 respectively (Economist, 1995: 88-89). Second, the balance of employment has shifted from manufacturing to service industries in both Britain and Japan.<sup>2</sup> This change has brought the expansion of jobs which are sex-typed as women's and which require more flexible working arrangements than the conventional approach, leading to the feminization of the workforce in many service industries. At the same time, in both countries it is women to a far greater degree than men who bear the burden of inadequate welfare services and care facilities for children, old people and those who need care due to physical and mental illness (McDowell, 1989: 185-193; Mizuno, 1991: 252-260). From this perspective, part-time employment is understood in this study as the product of a compromise between patriarchy and capitalism, which enables married woman's labour time to be divided between the demands of production in the employment structure and the demands of reproduction in the family structure (Walby, 1986: 207; Ueno, 1990: 214-221).

This particular way of resolving the demand for women's labour has not been adopted in all countries, and some other industrialised countries have taken different approaches. For example, some states have provided child-care facilities which enable women to participate in the labour market on a full-time basis. Examples of this solution were widely seen in the former socialist countries and the People's Republic of China (Funk, 1993: 8; Heitlinger, 1993: 98-101; Stockman, Bonney and Sheng, 1995:84-86). Other states have resorted to the importation of foreign labour, either male migrant labour for industry, which makes it possible for

indigenous women to stay at home and take domestic responsibility on a full-time basis, or female migrant labour for domestic services, which helps indigenous women to participate in the labour market on a full-time basis. Examples of the former can be observed in some of the oil-rich countries in the Middle East and the latter can be seen in middle-class households in Hong Kong and Singapore (Heyzer and Wee, 1994: 37).

Moreover, the connection between state policy and the growth of part-time employment amongst women can be identified in the cases of France and the United States where part-time employment is less prevalent than Britain and Japan. The lower rate of women in part-time employment in France and the United States has been attributed partly to the absence of state policies encouraging women to work on a part-time basis in these two countries (Dex and Shaw, 1986: 126-127; Dex, Walter, and Alden, 1993: 105-110). In support of this point, in France, part-time employment amongst women has been increasing particularly since the introduction of fiscal incentives in 1992 (OECD, 1995: 18).

Both British and Japanese governments have chosen to promote part-time employment as a means of reorganising labour power according to the changing population structure and the increasing demand for different types of labour. This is clearly reflected in the higher levels of women's participation in part-time work compared with many other industrial countries. Amongst 26 member countries of the Organisation of Economic Co-operation and Development (OECD) (prior to the admission of Hungary in May 96), the proportion of women's employment in

the part-time sector ranged from 67.2 per cent in the Netherlands to 8.4 per cent in Greece in 1995. In this table, both the United Kingdom and Japan are located in the upper half group of countries with the rates of 44.3 per cent and 34.9 per cent respectively (the figure for Japan is an underestimate).<sup>3</sup> On the other hand, France and the United States are located in the lower half of the ranking with 28.9 per cent and 27.4 per cent respectively (OECD, 1996: 192).<sup>4</sup>

The promotion of part-time employment by governments is illustrated in Britain by the publication by the Department of Employment of a booklet, entitled 'The Best of Both Worlds' (DE, 1991b) and in Japan by the policy statement in the White Paper on Labour issued by the Ministry of Labour (ML, 1993), in which the creation of more flexible working practice in the form of part-time employment is encouraged (see Chapter 3)<sup>5</sup>. An examination of how the state has helped to shape part-time work in each country will demonstrate that the choices made by individual women are neither the sole nor the predominant explanatory factor in the growth and organisation of part-time employment. While part-time employment is promoted by the state amongst women, this pattern of employment is nevertheless continuously marginalized and disadvantaged in both countries.

These two countries have been chosen for this study for two reasons: first to examine the ways in which the law operates within, and contributes to the creation of, the situation where women participate in part-time employment under the support of the state despite the fact that the employees in this pattern of employment are disadvantaged in the labour market. The second and more

important reason for the selection of these two countries for this study lies in the fact that the ways in which the part-time employment of women is regulated through the law differ to a great extent and so do the legal approaches adopted in the recent attempts to improve the working condition of part-time women employees, reflecting the different legal structures in Britain and Japan. The growing concern over the position of these women has been reflected in various legal activities in both Britain and Japan in recent years, ranging from the changing of the existing legislation, the introduction of new legislation and law suits pursued by individual part-time women employees to improve their position. In Britain, a decision was handed down by the House of Lords in 1994, removing the threshold of working hours which previously restricted key employment rights to those who worked more than a certain number of hours. This shift was brought about by the continuous attempts since the late 1970s to apply to the situation of part-time women employees anti-discrimination legislation, in the form of the Equal Pay Act (EqPA) and the Sex Discrimination Act (SDA), under the influence of the European Union (EU) in favour of the promotion of sexual equality. In Japan several cases which involve part-time women employees have been brought to the courts and a special piece of legislation was introduced for part-time employees in 1993.

The question I wish to raise in this study is: why is it that, despite, first, the huge increase in married women's participation in paid work especially as part-timers, second, the changes to the law designed to assist part-time women workers, and third, legal challenges by part-time employees themselves to improve working conditions, part-time women employees are nevertheless still marginalised and

treated as second class workers at the workplace? Why are these women concentrated in lower-paid, lower-graded jobs in the labour market in the two countries? Why is it still women who are mainly expected to cope with waged work and the unequal distribution of labour at home? In examining these questions, I will look at how the law concerned with part-time employment has contributed to the creation of the double burden for women and the disadvantaged position of women in the labour market.

The approaches I will use for the analysis of the law in relation to part-time employment in Britain and Japan are those developed by Carol Smart (1989, 1991, 1992) and Francis Olsen (1990). Smart focuses upon the discursive power of the law which produces gendered subjectivity and the relationship between this and the production and reproduction of the male-dominated social order. On other hand, Olsen analyses the law relying upon the idea of the law as a mechanism which both operates within and reproduces the hierarchical conception of gender. These ideas are discussed in more detail in Chapter 2.

In this study, I conceptualise the law as one of the most significant social mechanisms through which discursive power operates in shaping and re-shaping power relations between men and women, and between employers and part-time women employees. I will argue that legal discourse has had a profound effect in both Britain and Japan on constructing part-time employment as a gender-specific and inferior form of employment which is largely reserved for women, who are constructed primarily as those who provide care for their families. At the same time,

the legal discourse operates in society alongside other discourses produced outside the legal regime, maintaining a close relationship with these by influencing and being influenced by them. In particular, the close association of the legal and political discourses are clear particularly when the location of the law-making bodies is considered. The analyses of discourses expressed in legislation passed by the British Parliament and the Japanese Diet (Parliament) can be, therefore, seen as the exploration of both legal and political discourses, while judgements issued by adjudicative institutions carry a narrower sense of legal discourse.

Moreover, in the area of employment, discourses produced in employment institutions play a significant role in influencing and being influenced by the legal discourse and it is, therefore, important to examine the discourses of part-time employment produced in the employment context. There are employers' defences recorded in the judgements of individual cases, from which employers' discourses can be analysed. However, these employers' arguments are modified according to the legal rules in order to present them within the legal institution, making it difficult to assume that the discourse of part-time employees which is extracted from these employers' legal arguments represents the discourse produced by and circulated by them within the employment institutions. I, therefore, analyse the managerial discourse of part-time employment which appeared in interviews with managers in Britain and Japan.

By examining the representation of part-time employment in managerial and legal discourses, I will expose the connection between these and the legal constructions

which enable employers to utilise part-time women workers on inferior terms and conditions of employment and enable men to resist changes to the reallocation of domestic work and to their position as privileged workers in the labour market. My contribution in this area is, therefore, to bring to bear a discourse analysis to the understanding of women's part-time employment in order to illuminate how the law operates to shape and reshape unequal gender and economic relations in Britain and Japan.



## **1. The Research Approach**

Orthodox legal scholarship assumes that the law is an autonomous doctrine which holds its own principles, theories and method, and that its main task is to examine the contents of legislation, case law and the interpretations of these. However, to pursue the objective of this study as stated above, I will adopt an approach which does not follow this orthodox research approach of the legal discipline. This needs to be briefly explained and justified prior to the substantive discussion. Below, I first outline the methods employed to collect data presented in Chapters 3, 4, 5 and 6 in this study and the reasons for the adoption of these methods. Then, I will discuss methodological issues which arise from conducting interdisciplinary and comparative research.

### *Research Method*

The evidence for this study consists of three kinds of data, each of which were collected by different methods. These are: statistical data, data collected through interviews and questionnaires, and data collected from a critical reading of the traditional legal sources, such as case reports, legislation and parliamentary records. The statistical data set out the basic structure of part-time employment in Britain and Japan with which I can compare and contrast the managerial and legal representations of part-time employment and the employees in it. This means that, while the collection of the statistical data aims to identify the overall picture and actual conditions of part-time employment, the interviews with employers and the

reading of the legal sources are conducted in order to examine how knowledge about part-time employment is constituted through the discourses which circulate in the employment and legal institutions.

The first statistical data are presented in Chapter 3. The main source of this information is various surveys and statistics which were published by the British and Japanese Governments. Some of these surveys feature special topics related to this study, such as a special report on part-time employment in Japan, and others are regular publications, such as the British and Japanese Labour Force Surveys. There are specific difficulties entailed in the interpretation and comparison of these data as will be discussed in Chapter 3. The second set of data is presented in Chapter 4, collected through fieldwork conducted in Britain and Japan. The same format of questionnaire (see Appendix) was circulated amongst managers in the hotel industry in Britain and Japan, and interviews were conducted with them. The details of why this particular industry was chosen and how the fieldwork was set out in the two localities in Britain and Japan are discussed at the beginning of the Chapter 4. The methodological issues and methods used for the collection of the two sets of data, those obtained from statistics and those from the fieldwork, are discussed in more detail in Chapters 3 and 4. This is because the data of these chapters come from very different sources and take very different forms from those of the legal data, raising distinct methodological issues on their own.

The third set of data was collected through the reading of traditional legal sources in Britain and Japan. The former is presented in Chapter 5 and the latter is in

Chapter 6. In the case of Britain, I examine the contents of related legislation, such as the Employment Protection Consolidation Act (EPCA) 1978, the Equal Pay Act (EPCA) 1970, and the Sex Discrimination Act (SDA) 1975, and case reports, such as the Industrial Relations Law Reports (IRLR). In the case of Japan, I examine the contents of related legislation, such as the Labour Standard Law (LSL) 1945 and the Law on Part-time Employment (PEL) 1993 and case reports, such as *Rodo-hanrei* (The Labour-related Case Reports). In addition, the legal materials for Japan include records of debates in the Diet and an interview with former *pato* women employees who are in legal dispute with their former employers. The records of debates in the Diet are included in the Japanese legal sources since vital and direct political discussions concerning part-time employment have been carried out in recent years at the time of the introduction of a new piece of legislation, the Law on Part-time Employment, in 1993. Also, the interview with the ex-part-timers is used since very few cases so far involve an equal pay claim as this case does (see Chapter 6).

It should be noted that different methods are adopted to identify the discourses of part-time employment in the employment and legal institutions; the former involves interviews with employers and managers while the latter involves mainly the critical reading of legal texts taken from conventional legal sources. One reason for this is practical, since written statements on part-time employment by managers and employers are much less readily available than those by the legal institutions, including adjudicative and law-making bodies. The other reason lies in the

importance of written language in the legal institutions, particularly in passing judgements for and/or against part-time women employees.

*Methodological Issues: Between Disciplinary Boundaries*

This study adopts a non-orthodox legal research method in two ways. First, it devotes a substantial part of the content to analysing the statistical information on part-time employment and the interviews with employers as well as examining related legal texts. It is probably less unusual to include materials which are not strictly legal, such as statistical data, in the study of employment law than in other legal fields since the study of this legal area is intimately connected with that of industrial relations whose guiding disciplinary principles can be seen primarily as sociological. However, this study attaches far greater significance to the analysis of these non-legal materials than do mainstream studies of employment law which take in non-legal materials on a rather limited basis.

This raises the question of whether my study is primarily a legal, sociological or interdisciplinary study. This is probably a question which causes great anxiety for any researcher who selects or more precisely, is forced to select because of the nature of the research, an unconventional research method within a particular discipline where a specific disciplinary method has been long established. In particular, a distinctive set of doctrines and method prevail within the study of law which exhibits a strong tendency toward self-containment or “closure”. Roger Cotterrell describes this closed nature of legal doctrine and method as follows:

To adopt an idea of legal closure is to claim that law is self-standing and irreducible or has an independent integrity which is normally unproblematic, natural or self-generated, not dependent on contingent links with an extralegal environment of knowledge or practice (1993:175).

Strongly criticising this tendency in the legal discipline, Cotterrell advocates a closer integration of legal studies with sociological analyses in order to provide a viable legal theory and overcome the limitation of the conventional legal method which is narrowly confined within the legal discipline (1992:3-8). Cotterrell claims

an understanding of the nature of law requires not only systematic empirical analyses of legal doctrine and institutions but also of the social environment in which legal institutions exist (1992: 3).

As Cotterrell points out, it is necessary to open up the closed legal doctrine in order to examine and provide a satisfactory account of the operation of the law in a social context. In order to do so, it is certainly useful to utilise accumulated knowledge available in sociological studies since, as Donald Black puts it, “sociological knowledge has applications in the practice of law, in legal reform, and in jurisprudence and social policy” (Black, 1989:102). However, the opening up of the legal discipline cannot be achieved if legal studies which do not adopt the orthodox enquiry method, are labelled as not being “properly” legal and I am acutely aware of the risk of my study being so labelled. However, I wish to emphasise that my study is a legal study which possesses an interdisciplinary character by drawing on the knowledge of two other disciplinary fields, sociology and women’s studies. This

approach, I believe, enhances the understanding of the operation of the law within the legal discipline rather than giving this study a deviant status.

The second aspect of the analytical approach adopted in this study which raises a question of whether it is a “proper” legal study or not, arises from the way in which I handle legal materials. The main aim of analysing the legal materials in this study is not to explore the direct consequence of the rule of the law in the area of employment but to extract the legal construction of men and women, and such concepts as full-time and part-time employment in this particular field of law. This means that despite closely examining the conventional legal sources, such as legislation and case reports, I look at these not as a set of given rules which should be analysed according to the established and closed legal doctrines but as texts which are at least partially open to interpretation and can be read closely to deconstruct them (Goodrich, 1986: 219-223).

This approach follows a growing number of critical legal studies in recent years which challenges conventional legal scholarship by analysing the law in terms of its discursive power based largely on post-structuralist frameworks.<sup>6</sup> Although recent developments in this area have been diverse and each commentator needs to be given individual attention, these critiques share some common concerns. Hunt, a leading critical legal theorist, claims that one of the concerns in this movement is to reveal a particular assumption about the nature of the legal subject (Hunt, 1987:14). According to Hunt, legal subjects are “the bearers of rights and duties” (1993:120) and he explains the relationship between these and legal discourse as follows.

Legal discourse transforms both human beings and social entities; for example, corporations become “legal subject”. Legal subjects ..... are the primary constituents of the form of law, ..... The creation of legal subjects involves the recognition of “the law” as the active “subject” that calls them into being. It is by transforming the human subject into a legal subject that law influences the way in which participants experience and perceive their relations with others. (1993:120-121)

The recent developments in feminist legal analyses can be considered as an important part of this movement of critical legal studies, recognising the significance of the question of the legal subject and legal concepts with particular reference to gender. My study is influenced by these recent legal debates, particularly those led by post-structuralist feminist legal scholars who explore the gendered legal subject and gendered legal concepts, and the impact of these on the production and reproduction of the male-dominated social order under which women are systematically disadvantaged. This is discussed in greater detail in Chapter 2.

This study focuses upon the process and the effects of the legal constructions of part-time employment and the women in it through the power of discourse. This means that I am engaging with the analysis of discursive power which operates at every corner of society, including legal, political, and managerial regimes, not only at the national level but also at the international level. The idea of the closed legal discipline and legal method is clearly at odds with this perspective. An examination of the close interaction between the law and other social institutions will

demonstrate that the conventional assumption of law as an autonomous discipline is itself a discourse of the law which grants more power to the law to produce one of the most influential bodies of knowledge in society (see Fitzpatrick, 1992: 3-12, 183-210, where the general assumption of the law is viewed as a myth of the law). In this context, the two unconventional aspects of the research method adopted in this study, that is giving significant weight to non-legal materials and handling the legal materials as texts from which various discourses are identified, are intimately related to each other.

### *Methodological Issues: Between National Boundaries*

Alongside crossing disciplinary boundaries, I am also working across national boundaries by adopting an international comparative approach in this study. Any cross-national researcher encounters various difficulties related to such issues as inconsistent definitions in the comparison of phenomena, differing understandings and conceptualisations of phenomena and different ways of conducting fieldwork. In the case of this study, the first obvious difficulty arises from different definitions and perceptions of patterns of employment, such as full-time and part-time employment in the two countries compared, Britain and Japan, where different employment practices prevail. I will discuss this issue as part of an attempt to establish definitions of employment patterns observed in each country in Chapter 3. Also the same point will be discussed in Chapter 4 in relation to analysing data collected through the fieldwork in Britain and Japan.



Here, I should like to focus upon a methodological issue which is of particular concern for the analysis of discourse, whose primary aim is the interpretation of the meanings of spoken and/or written language. Cross-national researches involve the translation of different languages; in this study, this is the translation of the Japanese into the English language. The difficulty of dealing with two different languages appears in this study at two different levels. At one level, it refers to a conceptual difference of meanings attached to similar words used in the English and Japanese languages, reflecting the different cultural, economic and social environments in two societies. An example of this is the different conceptualisation of “part-time employment” in the two countries, which is directly related to the question of the discursive construction of this pattern of employment. This is discussed further in Chapter 3.

On another level a challenge arises from a more linguistic structural difference, that is, a different way of constructing sentences in the English and Japanese languages. Obviously this study is not linguistic but this problem affects greatly the analysis of discourse. For example, there is a marked difference in the treatment of the subject in sentences; while in the English language a clear reference to the subject of the sentence is essential, in the Japanese language, such clear reference to the subject is often avoided (Kindaichi, 1991:181). This may sound odd for English speakers, but to those who are native Japanese speakers, including myself, the question of who the subject is rarely enters the mind since on most occasions, the context makes it possible to assume the subject and/or the question of who it is can be considered as irrelevant.

However, a problem surfaced when I attempted to translate Japanese texts into English since I often found myself consciously deciding what is the subject of that particular sentence to make sense in English. At this stage, I recognised one of the methodological issues of comparative research since the English transcripts of the interviews with the Japanese managers and Japanese legal texts have already been given a particular interpretation by me. Although I sincerely tried to reproduce the Japanese text as closely as possible to the original meanings in English, I insert “author’s translation” after these transcripts to make my responsibility clear. Others which do not have this insertion are taken from the sources for which official translations are already available or those which are already published in English.

Post-structuralist epistemological arguments suggest that nobody is capable of producing pure and unmediated truth without being affected by their particular standpoints. Nevertheless, I recognise the necessity to refer to the issue of translation and fully accept the limitation in producing evidence. The research for this study, however, including interviews with managers and the reading of the legal texts, in both Britain and Japan were conducted by myself without using an interpreter. This means that my study escapes this layer of interpretation involving a third party.

To summarise, I wish to emphasise both the importance and the difficulty of crossing boundaries, either on disciplinary or national lines. It is important to question and cross the established boundaries in order to challenge the orthodox and dominant ways of conceptualising the objects of study. For example, without

referring to the contributions made by studies in the field of sociology and women's studies, it would not be possible to support an argument concerning the relationship between the law and the male-centred social order. Also, without conducting a cross-national enquiry, this study could not recognise different ways of conceptualising an apparently similar phenomenon, part-time employment, in different countries. On the other hand, it is difficult, despite all the useful insights one can gain, to cross boundaries not only because of various practical methodological problems but also because of the sense of anxiety involved in being on the outside and not being considered a "proper" researcher producing a recognised piece of work by conventional methods within particular disciplinary and/or national boundaries.

## **2. The Contents of the Study**

In Chapter 2, I will first examine the three different ways in which feminist legal theorists have explained the contribution of the law to the formation of the current disadvantaged position of women in society and clarify why the third approach, based upon the post-structuralist perspective, adopted for the theoretical framework of this study. The first and most widely adopted approach in the area of employment is based largely on liberal feminist tradition where legal gains are seen as vital for the improvement of women's position. By working within the legal regime, theorists in this group accept implicitly or explicitly the conventional assumption of the law as a gender-neutral and objective institution which can promote the interest of women if it is used correctly. Under this approach, the main concern is legal reform rather than questioning the internal rules of the law which elevates itself as an, at least potentially, autonomous and objective institution of social justice.

Two other feminist approaches question the orthodox assumption of the law as a gender-neutral and objective institution. The second approach views the law as patriarchal in the context of the male-dominated social structure, insisting that the current law is a fundamentally male institution which plays a key role in oppressing women. Under this view, the law cannot serve women's interests without revolutionising its fundamental governing rules. The third approach takes a post-structuralist stance, rejecting both the conventional assumption of the law as a gender-neutral and objective institution and the claim made by those who take the

second feminist perspective of the law as male. In this approach, a particular attention is paid to the discursive power of the law by which subjectivity, concepts and values are produced.

The second and third approaches, unlike the first approach, highlight the inherent problems of the law under the existing unequal power relations between the sexes. This is undoubtedly a significant contribution in understanding the operation of the law. However, feminist legal theorists who adopt the second and third approaches, have developed their views largely through the exploration of sexuality and crime related issues such as rape, pornography and violence against women. This focus highlights women's subordination in terms of the construction of women's subjectivity and sexuality through the law. As a result, the law is primarily viewed as a mechanism which imposes a subordinated position and/or subjectivity on women and allows men to treat women as objects for their sexual and violent desire. Under this view, the law (at least in its current form) is assessed negatively and its ability to alter the subordinate position of women in society is severely doubted or dismissed. A focus on employment, however, introduces another set of power relations between employers and employees based on economy, which is also incorporated in the law, and requires investigation into the ways in which conflicting interests between men and women and between employers and employees are negotiated and resolved through legal institutions. My approach is to look not just at how discourse produces women's subjectivity (which has already been explored in relation to part-time women workers in Japan by Kondo (1990)),

but at how discourse is related to the actual employment conditions and legal structures of women's part-time employment.

Following the analysis of feminist legal theories, in Chapter 3 I will first introduce a pair of concepts, '*pato*' and 'formal' employment in the case of Japan, in order to distinguish this context from that of part-time and full-time employment in Britain, focusing upon the different ways in which workers are categorised and divided in the two labour markets. In doing so, I underline the different conceptualisations and construction of part-time employment in the different structures of the British and Japanese labour markets. Then, I will discuss the structure and social context of part-time employment in Britain and Japan through the examination of various statistics and surveys, illustrating the specific characteristics of part-time employment for women in each country. Based on these data, I critically examine and challenge the dominant managerial and legal constructions of both part-time employment and the women employed in it in the two countries.

In Chapter 4, I will present the evidence collected from my empirical work in the hotel industry in Britain and Japan. The purpose of this chapter is to examine the representation of part-time employment amongst managers and employers in the industry and to identify and deconstruct the discourses on part-time employment put forward by the representatives of employment institutions (in contrast to the legal institutions). I will also examine these representations in the context of the structural patterns and conditions of part-time employment in the industry and of

part-time women employees in the family, drawing both upon data collected through the fieldwork and upon statistical information presented in Chapter 3.

In both Britain and Japan, employers are a highly visible set of actors in determining employment relations and are directly involved in disputes with part-time employees in the legal institution, while men as privileged workers and partners are much less likely than employers to do so. In these legal disputes, employers have influenced not only the outcomes of regulatory means but also the formation of the legal discourse which constructs part-time employment in a way which disadvantages women. To demonstrate the significance of the social context in shaping the law, it is of prime importance to reveal the connection between employers' and legal discourses. To do this, I will examine employers' representations of part-time employment and assess to what extent these representations have been incorporated into the legal construction of part-time employment in Britain and Japan.

In analysing the representation of part-time work by employers, I will identify two main discourses through which difference is produced between part-time and full-time employment and between the work of men and women. I will then show how, on the basis of these constructed differences, both part-time employment and the employees in it are represented as inferior in value to full-time employment and full-time workers, and therefore deserving of less favourable treatment. These constructions are central to the knowledge circulating on part-time work in employment institutions, which is produced through the discourses and helps to

differentiate full-time and part-time employment and create a hierarchical structuring of the labour force based on gender.

The first of the two discourses identified is the labour difference discourse, which constructs inferior value on the basis of labour-related differences in part-time employment, such as working hours and job content. The second is the discourse of gender difference, which constructs the inferior value of part-time employees on the grounds of their gendered domestic position as wives and mothers who prioritise domestic commitments over paid work. Although I identify these as two distinct discourses in my analysis, I will show that in fact they are intricately bound up together in managers' representations of part-time employment, suggesting the close association of labour-related and gender-related differences.

I will then go on to examine the legal evidence relating to part-time employment, first in Britain in Chapter 5 and then in Japan in Chapter 6. I will show that the same discourses appear in legal representations of part-time employment in both countries although in the legal context the two discourses appear more clearly separated than in the managerial context. One reason for this is that, although a close connection between the two discourses also exists in the legal scene, this connection is in a context where women cannot be differentiated and treated less favourably on the basis of their sex because of one of the most important legal principles, "equality between men and women under the law". This means that, to judge employers' action as legal in treating part-time employees less favourably than full-time employees, the legal institution must attribute this to apparently gender-



neutral labour-related factors, such as working hours and the different value of work. In this way, the gender difference discourse ostensibly disappears and the labour difference discourse takes its place in the area of employment, promoting an impression that gender is irrelevant in this area of the law.

However, in Britain the gender difference discourse has resurfaced in recent years in a different context where the equal treatment of part-time employees is accepted in the legal institution on grounds of sexual equality. In Japan, while the gender difference discourse has been more or less set aside in the courts which handle cases related to employment law, it can be observed in some sections of the related legislation and in debates held in the law-making bodies.<sup>7</sup> This demonstrates that the gender difference discourse also operates in the law, giving a gender specific identification to part-time employment although it appears less directly than in the managerial context.

In Britain, the way in which part-time employment has been discussed in the legal institutions has changed radically in recent years. Applying the principle of sexual equality to the situation of part-time women employees, the less favourable treatment of part-time employees may now amount to sex discrimination because the majority of these employees are women. In this context, the legal approach to part-time employment has shifted from the labour difference discourse, where the inferiority of part-time employees is built upon the constructed differences in labour-related factors, to the gender difference discourse, where the different domestic position of women is highlighted to claim equal treatment as employees.

Previously the British legal institution utilised the same labour difference discourse as can be observed in the employment institutions, and accepted employers' claims that part-time employees are different from and therefore, deserve less favourable treatment than full-time employees. However, the situation has been changed by the application of the anti-discrimination legislation. Under this approach, although the same gender difference discourse as can be observed in the employment institutions, is adopted in the legal institutions, it is used to prevent employers from treating part-time employees less favourably. An interesting aspect of this development is that, although the employment and legal institutions deploy the same discourse of gender difference, their reasons for doing so are in opposition; while employment institutions use the gender difference discourse to discriminate against women, the legal institution uses it to promote sexual equality.

In Britain, the legal position of part-time women employees has improved considerably thanks to the shift in the legal approach to part-time employment under the principle of sexual equality. However, a problem can be identified, which has accompanied the redeployment of the gender difference discourse in the legal institutions. The reappearance of this discourse gives renewed emphasis to the different roles of the sexes and reproduces the gendered domestic position of women primarily as care providers for their families. Moreover, the sexual equality approach obscures the inequality between part-time and full-time employees who perform work of equal value during the same unit of time since it focuses more on the sex of part-time employees rather than the content and value of their work. In this context, the perception of the inferior value of part-time work has not been

deconstructed thoroughly enough. As a result, the idea of women receiving preferential treatment in the law has been created since the law demands equal treatment of part-time women employees despite the perceived inferior value of their work.

In the Japanese legal scene, “*pato*” employment was redefined by the new legislation introduced in 1993 as a working pattern which is differentiated from ‘formal’ employment based on its shorter working hours (for the explanation of the concepts of *pato* and formal employment, see Chapter 3). This is an attempt to exclude those who work full-time hours but are defined and treated as *pato* employees - a particular feature of Japanese part-time employment. Having excluded these full-time *pato* employees from the definition of *pato* employees, the Japanese legal institution reinforces the labour difference discourse, in which the difference and inferiority of *pato* to formal employment is highlighted and the less favourable treatment of *pato* employees is legitimised in contrast to the privileged position of formal employees who are covered by the so-called “life-time” employment system.

The Japanese court, unlike the British legal institution, does not apply the notion of sex discrimination to the situation of *pato* employees despite the fact that the majority of *pato* employees are women. As a result, the labour difference discourse appears to be dominant there. However, the thinly hidden gender difference discourse was exposed in the debates in the Diet which took place prior to the introduction of the new legislation in 1993. I will demonstrate that both labour

difference and gender difference discourses operate in the Japanese legal scene, constructing the difference and inferiority of *pato* employment and gendering this particular pattern of employment as women's. It is this construction of *pato* employment that enables employers to exploit *pato* women employees more than formal employees and allows men to have much greater access than women to the privileged positions of formal employment. This demonstrates that the managerial discourse of *pato* employment as an inferior form of employment to formal employment is much more closely incorporated into the Japanese legal scene than in Britain.

Finally, in Chapter 7 the conclusion is drawn from the previous discussions. The legal position of part-time women employees in Britain has improved considerably in recent years through the application of the principle of sexual equality and this possibility should be explored in Japan. However, a remarkably similar picture appears in the two countries in terms of the discursive power of the law. The legal discourse in both Britain and Japan contributes to the creation of the gendered hierarchy where part-time employment is gendered as women's; the gendered domestic position of women as wives and mothers is highlighted; and the difference and inferiority of part-time employment is constructed - whether by obscuring the equal value of part- and full-time employment as seen in Britain or positively articulating the inferiority of *pato* to formal employment as seen in Japan. This legal construction contributes to the shaping and re-shaping of power relations between the sexes, and between employers and part-time women employees by allocating

domestic labour and reserving a disadvantaged pattern of employment to women in both British and Japanese societies.

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<sup>1</sup> In Britain, however, there has been a decline in the number of full-time employees amongst male workers and a rise in the number of part-time male employees and those who are classified as economically inactive. In 1979, there were 13,105,000 full-time male employees in comparison to 10,624,000 in 1996, showing about 19 per cent of full-time jobs disappeared amongst men during this period (BLFS, 1979: 15; BLFS Historical Supplement, 1996: Table 2b). In contrast, men in part-time employment increased from 239,000 in 1979 to 873,000 in 1996 (BLFS, 1979: 15; BLFS Historical Supplement, 1996: Table 2b) and those who were classified as economically inactive increased from 4,067,000 in 1979 to 5,993,000 in 1996 (BLFS Historical Supplement, 1996: Table 1b). The number of unemployed amongst men also increased from 787, 000 in 1979 to 1,514,000 in 1996 although the number of unemployed has been reducing in recent years. However, the great majority of men are still in full-time employment compared to women (see Chapter 3).

<sup>2</sup> The structure of employment in Britain in 1992 consisted of 2.2 per cent of all employees in the primary industry, 26.2 per cent in secondary and 71.6 per cent in tertiary industry. In Japan, in 1993 those proportions were 5.9 per cent, 33.7 per cent and 60.4 per cent respectively (Bank of Japan in KKC, 1994: 20)

<sup>3</sup> The figure cited here from the OECD Employment Outlook was compiled from the Japanese Labour Force Survey which adopts the definition of part-time employees as those who worked 35 hours or less during the reference week. However, another official survey, the Survey of Part-time Employment 1990, which specially featured part-time employment, defined part-time employees as those who actually work shorter hours than their full-time counterparts and those who are called and treated as part-timers at the workplaces. Using this method, the Survey found that approximately 20 per cent of all surveyed part-timers worked as long as their full-time counterparts. The current legal maximum working hours are 44 hours per week. This means that about 20 per cent of part-time employees do not appear in the Japanese Labour Force Survey, which adopts the criterion of less than 35 hours per week to define part-timers. Supposing that

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about 20 per cent of part-timers are excluded from the number of part-time employees counted in the Japanese Labour Force Survey, and adding this 20 per cent brings the proportion of part-time employment amongst women in Japan to 43.6 per cent (34.9/0.8), which is close to the level of the UK. This point will be further discussed in Chapter 3.

<sup>4</sup> It should be, however, borne in mind that this kind of international comparison of part-time employment is extremely difficult because of the inconsistent definition adopted in each country. For example, in France and the United Kingdom it is based on respondent's own classification. In Japan part-time employees are defined as those who actually worked less than 35 hours during the reference week, while in the United States part-time employees are defined as those whose usual working hours are less than 35 hours per week.

<sup>5</sup> The Japanese Government also provides fiscal incentives for married women to work part-time.

<sup>6</sup> In this study, the term post-structuralism is used as a set of philosophical frameworks which makes an explicit contrast to structuralism. Madan Sarup (1993) gives an account of the difference of structuralism and post-structuralism as follows.

(S)tructuralism sees truth as being 'behind' or 'within' a text, post-structuralism stresses the interaction of reader and text as a productivity. In other words, reading has lost its status as a passive consumption of a product to become performance. .... Post-structuralism, in short, involves a critique of metaphysics, of the concepts of causality, of identity, of the subject, and of truth. (1993)

On the other hand, Sarup understands postmodernism as "the name for a movement in advanced capitalist culture, particularly in the arts", suggesting that post-structuralism is a part of this movement but that these two terms are not interchangeable. This study focuses on issues which are the main concerns of post-structuralism and uses this term throughout.

<sup>7</sup> The gender difference discourse also operates strongly in the area of social security in Japan.

## **CHAPTER 2: FEMINIST LEGAL ANALYSES OF THE LAW**

### **Introduction**

The aim of this chapter is to review the feminist legal literature and clarify the analytical framework of the present study. It is clear that an analysis of the law concerning the part-time employment of women in Britain and Japan cannot be achieved in a satisfactory manner without questioning orthodox, that is male-centred, legal theories and method. Feminist legal analyses are of great relevance to the question of the disadvantaged position of women in society since these identify gender relations as a central consideration. There are, however, various feminist approaches and it is necessary to discuss the strengths and weaknesses of each of these in order to justify the position taken in this study.

As introduced in Chapter 1, three different strands of feminist legal critiques are identified. These are named as: the liberal approach; the patriarchal structuralist approach; and the post-structuralist approach. The specific points of disagreement amongst these are discussed in terms of how the nature of the law is perceived by each category of feminists, what alternative they offer and how their positions should be assessed in relation to the employment of women. Through this examination, I will demonstrate that the post-structuralist approach sheds light on the way in which the law re-shapes the disadvantaged position of women both in the labour market and at home, and legitimises unequal gender relations. This is because analyses of the power of legal discourse show that the law is not a simple



product of the concrete reality of women's oppression or the patriarchal social order, but is an active power which produces and reproduces the hierarchical position of men and women in society.

This study recognises the value of a perspective which understands existing unequal power relations in society (either between men and women or between employers and employees) in terms of the production and dissemination of knowledge through discourse. I, however, wish to make it clear here that my position is different from that of some post-structuralists who tend to reduce any claims based on structural reality to the level of linguistic constructions which are only brought into existence through discourses or "language games" (Lyotard, 1984: 11; for general criticisms of the extreme tendency for some post-structuralists to deny the possibility of attaining some form of structural knowledge, see, for example, Giddens, 1990: 46). To me, the importance of the power of legal discourse lies in its major contribution to creating and re-shaping the concrete structural facts of the markedly poorer working conditions of part-time than full-time employees, the double burden of women, and their disadvantaged position in the labour market as well as at home, rather than conceiving these solely as rhetorics or narratives.

Below I assess the three different feminist legal approaches in terms of their weaknesses and strengths particularly in relation to the employment of women, which is the main research object of this study. In doing so, I emphasise the usefulness of the post-structuralist approach in providing an account of the central role of the law in producing and reproducing unequal gender power relations.

## **1. The Liberal Approach**

Naffine (1990) and Smart (1992) identify three distinct phases in the development of feminist legal thought. In the first phase, the law is considered as a social institution which has been abused by men but has the potential, if used correctly, to eliminate social inequality between the sexes. Naffine claims that in this stage “the prevailing idea is accepted that law should be (and can be) impartial and reasoned” and “the objection is to the failure of law to adhere to its own professed standards when it invokes discriminatory laws and practices” (1990: 3-6). Smart summarises this stage as where a male-biased view of woman in the law is criticised while the assumption of the law as an objective and gender-neutral institution is maintained (1992:31-32). This approach can be seen as being based on the liberal feminist tradition which explicitly or implicitly accepts the conventional assumption of the law as an objective, impartial, and gender-neutral institution (but misused by men) by advocating legal reforms to improve the position of women.

While Naffine and Smart identify this approach as the first phase of the development of feminist legal thought in the Anglo-American legal scene, Olsen (1990:225) points out that the legal reformist approach is the most enduring approach of the three distinct categories of feminist legal thought in the United States. Indeed, a large number of legal commentators in the area of employment work within the liberal framework by accepting explicitly or implicitly the given legal theory not only in the United States but also in Britain and Japan. In consequence, their main aim is to improve the situation of women workers through legal reforms,

demanding equal rights or special protections for women workers (for example, Sedley, 1980; EOC, 1990; Owaki, 1994; Suzuki, 1993).

The problem with this approach is that the law is regarded as an instrument which can remedy the situation of women by extending rights or providing protection for them. This legalistic approach does not sufficiently take into account the social context in which the law has been created and operates. As pointed out above by Naffine, Smart and Olsen, this approach stands on the conventional assumption of the law as an autonomous and gender-neutral institution, which promotes the interests of “people” regardless of their gender if used properly. In viewing the law in this way, there is no clear awareness of the centrality of the law in the production and maintenance of existing unequal power relations between the sexes, a problem which clearly sets this approach apart from the second and third categories of feminist legal approaches discussed below.

I, however, regard the contribution made by the liberal feminist legal analyses as valuable in two ways. One is that this group of feminist analyses was the first to identify the bias against women in the law. This point is well illustrated by Smart’s critical comment on this feminist legal analysis.

.....a corrective could be made to *a biased vision of a given subject* who stands before law in reality as competent and rational as a man, but who is mistaken for being incompetent and irrational. This corrective suggests that law suffers from a problem of *perception* which can be put right such that all legal subjects are treated equally (Emphases added). (1992: 13)

This comment shows that one of the key investigations amongst liberal feminist legal analyses has been the assumption of the legal subject or, as Smart puts it, “a biased vision of a given subject” in the law. This can be seen that some liberal analyses of the law had provided a basis which was developed further in the second and third categories of feminist legal analyses, focusing more closely upon women’s subjectivity and/or the construction of women in the law.

The second contribution made by the liberal feminist analyses lies in the area of employment, which so far has been studied relatively little within the framework of the second and third categories of feminist analyses. The liberal feminist approach has had to accommodate the realisation of anti-discrimination legislation that has had a less than dramatic effect on the improvement of women’s position. Having seen the disappointing results, some feminists dismissed the law as irrelevant for feminist projects (for example, Pascall, 1986: 32). Others have attempted to develop more sophisticated interpretation of anti-discrimination law, as seen in the wider application of the concept of indirect discrimination in Britain. Under this concept, emphasis has shifted from the demand for the straightforward equal treatment of women to an approach whereby the different position of women in society is recognised and assessed positively in the law (Liff and Wajcman, 1996: 81-82). This is an attempt to change the conventional legal logic from inside the legal discipline and should not be brushed aside lightly as ineffective. As will be seen in Chapter 5, many women workers in Britain have benefited from this achievement.

Considering the strength and relevance of the liberal feminist approach in the area of employment, I assess the practical usefulness of this approach in a positive way. However, the crucial weakness of this approach lies in the lack of clear recognition of the close linkage between the formation and inherent rules of the law and a male-dominated social order. This lack of recognition appears most sharply in a rather unconvincing explanation of the cause of the law's failure to eliminate sexual inequality in the labour market and in society more generally. Under this approach, the failure of the law is often accounted for in terms of the absence of appropriate regulation and/or problems of the interpretation and administration of legal provisions, and as a result, further legal reforms are advocated.

My analysis of the legal treatment of part-time employment, however, will demonstrate in subsequent chapters an inherent problem of the law for women, which cannot be reduced to a matter of providing adequate regulations and would not be corrected by such action. Through the discursive operation of the law, the apparent legal gains for women are often rendered to modes of reshaping the unequal power relations between the sexes in different ways. In this sense, the adoption of the liberal approach as the analytical framework of this study is not sufficient although I do not deny the necessity and importance of the continuous effort to reform the law in a way which accommodates the practical needs of women.

## **2. The Patriarchal Structuralist Approach**

Different types of feminist legal analyses have been developed in the 1980s and 1990s in the Western countries. The main investigative fields of these feminists are very different from those of liberal feminist lawyers. Although these new feminist analyses investigate various fields, their main concern lies in the non market areas, such as crime and family. In particular it has paid far greater attention to sexuality-related issues in criminal law such as pornography, rape and violence against women than to any other area (for example, MacKinnon, 1982, 1983, 1987; Smart, 1989, 1995; Lacey, Wells and Meure, 1990; Naffine, 1994)<sup>1</sup>. Through the examination of these issues, they directly challenge the conventional assumption of the law as an objective and gender-neutral institution and the orthodox legal theory, or jurisprudence, emphasising the close association of the law with the male dominated social order in modern society. These analyses of the law share some characteristics: the rejection of the conventional assumption of the law; strong theoretical concerns; and a focus on sexuality, violence and family related investigative fields. These features are clearly different from those of the liberal legal approach. On the other hand, these new feminist analyses have to be divided into at least two further categories, which I name the patriarchal structuralist approach and the post-structuralist approach respectively. Below I first focus upon the patriarchal structuralist approach.

In the early phase of the development of the second category of feminist legal critiques, radical feminists played a leading role, emphasising the centrality of the

sexual exploitation of women by men and adopting the concept of the “patriarchal” law which allowed such exploitation (MacKinnon, 1982, 1983, 1987, see below). Subsequently, the idea of the patriarchal law was taken up by feminists who do not necessarily agree with radical feminists on the specific point of locating sexual exploitation of women by men as the single most important source of the oppression of women (for example, Polan, 1982: 295; Dahl, 1987: 14). This means that this category of feminist legal analyses includes feminists who come from various different strands of feminism, but are united by their view of the law as patriarchal and, in this sense, can be categorised as within the second group of feminist legal critiques.

Commentators in the patriarchal structuralist group commonly reject the conventional assumption of the law as autonomous, objective and gender-neutral, emphasising the patriarchal formation and operation of the law, and advocate the establishment of alternative feminist legal theory. One of the most prominent feminist commentators in this group is Catharine MacKinnon, a radical feminist lawyer, who claims that the law has been created by men and male culture in order to exploit women sexually (1982:516) and, therefore, it is fundamentally and irretrievably patriarchal. She points out the inability of the law to serve the interests of women referring to such matters as pornography and emphasises the necessity of producing non-male-biased legal theory based on the radical feminist perspective which is, to MacKinnon, the “real” feminism (MacKinnon 1983:639).

However, there are sharp disagreements amongst commentators in this category concerning what kind of non-male-biased legal theory they should establish and how this can be achieved. For example, MacKinnon argues that it can be achieved only by the initiative of radical feminism and a consciousness-raising movement based on it, which allows women to “grasp the collective reality of women’s condition” (1982: 536). However, there are feminists who do not agree with this radical feminist claim even though they share the view of the law as male and agree on the necessity of alternative law. For example, Tove Stang Dahl, a Norwegian feminist, proposes the creation of “women’s law” based directly on the present experiences of women without resorting to their re-education through such activities as consciousness-raising movement. (see MacKinnon 1982, 1983, Dahl 1987:24; Smart 1991: 146-147 for comparative analyses of these two authors’ perspectives).

The sharp disagreement amongst commentators in this category concerning such fundamental questions as what exactly women-centred law consists of and how it can be created, highlights the first problem associated with the patriarchal structuralist approach, that is the impossibility of establishing one alternative feminist or “women’s” legal theory. This point was taken further by post-structuralist feminists who criticise the essentialist stance of the patriarchal structuralist approach, pointing out that the disagreement amongst them actually stems from their basic but incorrect assumption of the existence of a collective social group, women, who are essentially different from men. Post-structuralist feminists point out that it is impossible to identify women’s interests and to create the alternative law based on women’s consensus since such a subjectivity as



“woman” is unidentifiable. Women’s subjectivities are equally divided and fragmented by factors such as race, class, age, disability and sexuality, whereas sex divides men and women (see for example Bartlett, 1990; Smart, 1991).

Furthermore, the law is biased by other factors such as those mentioned above as well as sex. This implies first that the law is not only male but also white, capitalist, middle-aged, able-bodied and heterosexual, casting serious doubt on the usefulness of the claim of the law as male. Second, this leaves the alternative feminist or women’s law (if it is indeed possible to establish it) open to inevitable criticisms of not addressing the other biases. These points clearly undermine the insistence of the patriarchal structuralist legal analyses not only in terms of its view of the law as male but also its aspiration to establish an overarching alternative feminist or women’s legal theory (Smart, 1991).

Nevertheless, the contribution made by the patriarchal structuralist analyses is considerable since this position clearly linked the law and the adverse effect of legal rules on women with the existing social order in which women are systematically disadvantaged. This linkage is of particular importance since it provides grounds to question the conventional assumption of the law as autonomous, objective and gender-neutral.

Commentators in this category also contributed to the understanding of some important issues in the area of employment, firstly through the debate over whether women should be treated in the same way as, or in a different way from, men in the

law. Scale (1994) and MacKinnon (1987) argue that both strategies, which emphasise either sameness in order to promote sexual equality or difference to gain special protections for women, are inefficient since the key point in changing the subordinate position of women is to recognise the domination of men over women in constructing the sameness or difference of the sexes. MacKinnon writes that

man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to this measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. (1987: 35)

This statement suggests that women are constructed not on their own terms but on male terms by being constantly measured against men. According to MacKinnon, men are considered to be the standard of human beings in the law and women are always measured against them, irrespective of whether women claim equality to or difference from men. This point is of particular relevance to the law in the area of employment where the advancement of equal or special treatment for women workers has been debated at considerable length particularly around the issue of pregnancy and childbirth. Although the point made by radical feminists is illuminating, the problem is how the recognition of dominance instead of the notions of sameness or difference between the sexes can be translated into the law, particularly in such an area as pregnancy-related provisions for women in employment law. Some commentators point out that there is at least a strategic necessity to take either the stance of sameness pursuing equality or that of difference pursuing protections (for example, Williams, 1991; Conaghan, 1993; Kay, 1993).

Secondly, commentators in this category have contributed greatly to the legal recognition of sexual harassment at work which is one of the most important recent development in the area of employment. For example, MacKinnon claims that radical feminists have identified an action as sexual harassment, thereby making it possible for women who have experienced unwanted sexual advancement from men at work to bring their cases to the courts and demand a legal remedy for the sexual exploitation of, and injuries made to, them (1993: 145). Although sexual harassment is an important issue which demonstrates a clear and direct unequal power relations between men and women in the area of employment, this gives little room to raise the question of other unequal power relations between employers and women employees, which is observed in such situations as the higher concentration of women in lower graded and lower paid jobs than men.

Though it has deepened feminists' understanding of the law, there are difficulties in applying the patriarchal structuralist approach to this study. First, although there are feminists who do not take the radical feminist stance in this category, this approach has been dominated by radical feminists whose analyses are based on the sexual exploitation of women by men. In the area of employment, however, another form of exploitation must be incorporated in the analysis which is based on economic power between employers and women workers. This point is of particular relevance to this study since employers can benefit from the less favourable treatment of part-time women employees.

Second, this approach sees the law mainly as a negative and repressive force in patriarchal society without taking into account the active and positive discursive power which the law exercises in producing and re-producing a social order. As Smart points out, the law should not be considered as a simple tool of men for oppressing women but a complex institution which engages the creation of a social order under which women are subordinated (1989:138). I will also demonstrate that the law helps to construct part-time employment, producing and reproducing the way in which gender relations are formed in Britain and Japan.

### **3. The Post-structuralist Approach**

A third category of feminist legal analyses has emerged, largely stimulated by post-structuralist thinking, drawing on the work of Foucault, Derrida, Irigaray, and Kristeva (for example, Smart, 1989; Cornell, 1990; Frug, 1992). These feminists challenge the patriarchal structuralist claim that the law is male as well as the orthodox assumption of the law as objective and gender-neutral. These analyses pay particular attention to the discursive power of the law which contributes to bringing about a particular construction of “women” under unequal gender power relation. Naffine (1990) identifies Olsen and Smart as the two dominant contributors to this development (1990:12-19), claiming that the two commentators “have arrived at remarkably similar conclusions” (1990:13) because

both [Olsen and Smart] agree that law should not be regarded as a unity, as a single set of [male] cultural values. Law, they say, is as complex and contradictory as the dominant social order it reflects.(1990:13)

Certainly both Olsen and Smart criticise the patriarchal structuralist feminist legal analyses on the grounds that the law is not a coherent unity which is constituted and operated by male values but a complex and fragmented institution which encompasses not only men’s values but also a variety of different values. However, apart from this point, the positions of Olsen and Smart differ considerably. While Smart, drawing on Foucault’s work, claims that the law is a mechanism which produces gendered subjectivity, Olsen demonstrates that the law is a mechanism which operates within and reproduces the hierarchy of gendered concepts. Below I

examine the arguments put forward by these two authors more closely since this study relies partly on Smart's claim and partly on Olsen's argument by adopting an analytical framework of the law as a mechanism of hierarchical gendering.

Prior to the examination of these two feminist commentators, I discuss briefly how "discourse" is defined and treated in this study, looking at the implications for feminism of Foucault's conceptualisation of power based on discourse. It is important to clarify the definition of discourse since this is one of central concepts in this study. At the same time, the shortcomings of Foucault's work is discussed in terms of his lack of coverage of the location and operation of law and unequal gender relations in modern society, both of which are central concerns of this study. The lack of analysis of these two aspects in Foucault's work explains why this study has to turn to the post-structuralist feminist legal approach.

### *Discourse and Discursive Power of Law*

Andemahr, Lovell and Wolkowitz point out that discourse is one of the central concepts utilised in feminist theories in the 1990s despite the great difficulty in pinning down what it actually means. They draw on Foucault's definition of discourse as "the group of statements that belong to a single system of formation" and emphasise its particular importance to feminists since the causes of the oppression of women can be attributed more or less to the way in which the gendered subject is constructed and to "sexual and gendering discursive practices" (Andemahr, Lovell and Wolkowitz, forthcoming). They also claim that, although

the concept of “ideology”, which was often associated with Marxists and Marxist feminists in the 1980s, appears to have been replaced by discourse, the distinction between the two concepts has been maintained since “discourses are seen as language statements produced by particular institutions, through which ideologies circulate”. They then cite Pringle and Watson who claim that “the most powerful discourses have firm institutional locations - in *law*, medicine, social welfare (emphasis added). ” (Pringle and Watson, 1992: 65).

Foucault’s contribution lies in proposing a new analytical mode based on non-economic relations, that is the discursive production of knowledge or the power of discourse. Foucault challenges the notion of power which is ultimately located within the state and the law (1980: 95-96) and shifts the analytical mode from that based on the social structure to a more individual locus of power and discourse. He claims that

..... in society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse. (1980:93)

The articulation of the relationship between knowledge manifested in discourse and power is of great relevance to this study where the law is seen as a body of knowledge in society which constructs not only the legal subject but also legal concepts in its own terms. In particular, the importance of the construction of

concepts by discourse should be underlined here. Diane Macdonell puts this as follows.

..... any discourse concerns itself with certain objects and puts forward certain concepts at the expense of others. .... Different discourses elaborate different concepts and categories.(1986:3)

Holtmaat (1989) also points out the importance of the discursive construction of legal concepts in relation to Dutch labour law.

There are, however, two problems in utilising Foucault's framework in this study which analyses the law in terms of its discursive power and gender power relations. First, Foucault himself views the law as an outdated mode of control which forms a united body of the state (1980: 95-96), and power which resides in such old regime of the state and law as being repressive and negative. This type of power, including the power of the law, according to Foucault, has been withering in modern society where new scientific knowledge reigns and people are disciplined rather than punished (for criticisms on Foucault's perception of the law, see Smart, 1989:14-20; Hunt, 1993: Chapter 3).

It cannot be denied that there is a close relationship between the law and the state, and that the law is an ultimately coercive mode of control in society backed by state power which enforces the law physically through sanctions and punishments. However, at the same time, the legal institution is a site where a set of institutional languages (technical legal terms) circulates, distinguishing it from a daily context and other institutions. The legal language has to be learnt by legal professionals (for



example, Dugdale and Farrar, 1984:72-74) in order for these professionals to command authority as holders of legal knowledge. In this sense, the law is not only a repressive and coercive power but an important mechanism to produce one of the most influential discourses in society. This is pointed out by Pringle and Watson (1992) above and other leading thinkers in this area such as Lyotard as discussed below. Foucault failed to take sufficiently into account the complex social constraints within which the legal institution operates in modern societies such as Britain and Japan.

In contrast to Foucault, other post-structuralists, such as Lyotard, include the legal institution as one of the sites which produce powerful discourse alongside such institutions as the academy, the military and the corporation. Furthermore, Lyotard argues that while “consensus has become an outmoded and suspect value”, “justice as a value is neither outmoded nor suspect” and, therefore, advocates that we “must arrive at an idea and practice of justice that is not linked to that of consensus” (1984:66). Although it is not at all clear how this can be achieved, this comment shows the importance of the law, as an institution of justice, to maintain and operate within the framework of what is perceived as popular justice. This requirement places a great constraint on the legal institution in the exercise of its power since it makes it necessary for the legal institution to operate in such a way as not to invoke the sense of injustice in society.

The second problem associated with Foucault is his relative indifference to gender power relations. Bradotti claims that, although Foucault “is aware of the

disqualification of women as agents and consequently as subjects” in his work, the History of Sexuality, his works more or less remain “androcentric” and produces “phallogological discourse” (1986: 1-13). As a result, Foucault’s work suggests very little about how gender power relations are produced by, and operate within, gendered discourse.

This study focuses upon the gender-specific construction of the legal subject and legal concepts in relation to the disadvantaged position of part-time women employees in the labour market and at home. In order to analyse gender power relations and the relationship between these and the legal institutions within the framework of discourse proposed by Foucault, I now need to turn to two feminists, Smart and Olsen, who adopt the post-structuralist approach in their analyses of the law.

#### *Carol Smart: Law as a Gendering Mechanism*

Smart identifies her position as being different from those of the liberal feminists and patriarchal structuralists, attempting to develop the thesis of “the law is male” to “the law is gendered”(1992: 8) and bases her argument on the latter idea. Drawing upon Foucault’s work on the power of discourse as a starting point, Smart views the law as one of the most prominent “discourses (which) claim to speak to the truth and thus can exercise power in a society that values this notion of truth” (1989: 9). Moreover, Smart argues that “woman is a gendered subject position which *legal discourse brings into being* (Emphasis added)” (1992:34). However,

the problem of the law is, according to Smart, that, while the law is considered as a site of objective knowledge, the legal discourse creates “gendered subject positions” and exercises the power to “disqualify alternative accounts” (1989:11), such as feminist accounts.

Smart also questions the attempt to build up an overarching alternative feminist jurisprudence (1991:154-155). She criticises the tendency of some feminists who insist that knowledge gathered from “women’s experience” or “a particular feminist standpoint” is purer and non- or less-biased than orthodox, that is male-biased, knowledge. On this point, Smart is aware of the criticism which could be directed at her, that is, that this view demolishes the foundations of feminism. However, Smart argues

this assumes that both intellectual innovation and political work must have an absolute, unmediated object of knowledge on which to ground itself. This requirement seems to be set stringently for any forms of post-structuralist feminism, whilst many other feminists are allowed to operate on the basis of ‘as if’. Indeed feminism has long taken issue with common sense and its counterpart the ‘unmediated real’; recognising the cultural and historical elements of knowledge and rejecting the claim to a transcendental authority. (1992: 35)

It becomes clear that feminism is, for Smart, an activity which lodges a protest against orthodox, conventional, “common-sense” knowledge, which claims to be constructed from unmediated facts gathered by scientific methods and, therefore, to

be true. In Smart's view, the quest for a feminist jurisprudence, advocated by some feminists, notably MacKinnon, proceeds to the construction of an alternative "orthodox" knowledge. Smart appears deeply sceptical about any such attempt since metatheories, she argues, are founded on their specific feminist constructions of women which may constitute another form of oppression for some women who cannot conform to them. This is because these theories would inevitably dismiss other accounts by their claim to speak the truth. Furthermore, she points out that feminist activities in search of a new feminist jurisprudence "give a renewed legitimacy to the power of law to organise and regulate our lives" (1991:155) which inevitably aggravates the power of the law, rather than empowering women. As a consequence, she advocates women's greater engagement with non-legal strategies to "de-centre" the law rather than "accepting law's terms in order to challenge law" since "feminism always concedes too much" (1989: 5).

Smart's strong scepticism about the usefulness of feminists' engagement in the law for improving the situation of women has attracted much criticism (for example, Henderson,1991; Morris and Nott, 1991). This is not surprising since legal intervention is still seen as vital for many women in the West as well as other industrialised countries, such as Japan, even if the narrow concentration on legal gains can be questioned. However, the significance of Smart's contribution rests upon her articulation of the power of law as discourse, which has paved the way for feminist analyses of the law within a post-structuralist framework. She emphasises the importance of legal discourses in society as follows.

Law has its own *method*, its own *testing ground*, its own specialised *language* and *system of results*. It may be a field of knowledge that has a lower status than those regarded as ‘real’ sciences, none the less *it sets itself apart from other discourses* in the same way that science does (Italics added). (1989: 9)

Using this power of discourse, the law claims its own version of the interpretation of affairs and the construction of women as “true” while “disqualifying alternative accounts”, such as feminist accounts as “false” (1989: 11). This suggests that one of the most important battles between orthodox, that is male-centred, and feminist legal analyses (as well as amongst feminists themselves) is how concepts and the subject are constructed in the law. As mentioned above, Smart further emphasises the discursive power of the law by arguing that “woman is a gendered subject position which legal discourse brings to being”(1992:34). Here the legal discourse is considered as a mechanism which produces a gendered subjectivity. This approach suggests that the law, as a prominent discourse, closes off any alternative formation of the subject and, hence, perpetuates the current unequal power relations between men and women under the “phallogentric” social order. Although Smart focuses mainly upon the production of a gendered subjectivity by the legal discourse, I should like to emphasise a more general gendering mechanism of the law. As will be seen in Chapters 4, 5, and 6, I will base my argument on the idea of the law as a gendering mechanism, taken from Smart’s argument of “the law is gendered”, which produces not only the gendered subject but also gendered concepts such as full-time and part-time employment.

Smart's analyses of the law as discourse and a mechanism which produces gendered subjectivity is of great importance to this study. However, I should like to clarify here that I do not take the same sceptical stance as Smart does about women's involvement in legal activity. Rather, I see this as a necessary and vital part of women's struggles for following two reasons.

First, the withdrawal (or reduction) of feminist activity from the regime of the law, is problematic since feminists must resist the dominant discourse within, as well as outside of, the law. As Smart herself points out, the law is not one united entity despite its popular image as "the law" but is fragmented and encompasses "conflicting principles and contradictory effects at every level from High Court judgements to administrative law"(1989: 4). Moreover, each piece of legislation has been designed for the service of different aims and purposes and is oriented by contesting discourses. Although androcentric discourses are likely to be prominent in many laws, contradictory discourses, such as feminist discourses, also exist within the laws and continuously challenge dominant discourse by promoting localised, if not general, women's interests in the law. This is a form of resistance against the dominant legal discourse which claims to possess "true" knowledge about women. Giving up or reducing women's legal activity means stopping or easing resistance against dominant discourse within the legal institution which possesses power to produce one of the most prominent discourses in society.

Second, the law is clearly an institution which is defined by and operates in a particular social context. This means that the legal discourse must be altered in a

way society accepts according to constantly changing social and economic circumstances in order to sustain its position as a socially valued discourse. This recognition is important because, although Smart discusses the power of the law to disqualify or resist alternative accounts, Smart has relatively little to say concerning the power of these other accounts to disqualify the law. The acceptability and legitimacy of the law have to be earned by the law's own accommodation with social change. The law cannot be treated as a one-sided discourse which only disqualifies other discourses without also being at least partially disqualified by them. Law should be considered as being open to new negotiations, arising from the redistribution of power in society. The law cannot create a social or "gendered being" without negotiating with other discourses in society, otherwise the law itself is in danger of being disqualified. It is, therefore, necessary to examine the power of law in this interactive process of disqualifying and being disqualified. Smart's deep scepticism about the usefulness of feminists' legal activity may derive from failing to recognise this interactive operation of discourses between the legal and other social institutions. On the one hand, the interactive operation of the law suggests clearly that the narrow concentration on legal activity is not desirable nor productive for shifting the distribution of power between the sexes. On the other hand, it is also clear that the dominant legal discourse must be challenged by contesting discourses within as well as from outside its regime.

*Frances Olsen: Law as a Mechanism of Hierarchy*

Olsen also identifies herself as being in a different strand from liberal and patriarchal

structuralist feminists. She recognises that there is a third group of feminist lawyers who share a common characteristic in the rejection of the idea that the law is male although, except for this point, their positions differ considerably. Olsen bases her argument on the criticism and breaking down of the binary conception of society. According to her, modern (American) society is constituted by pairs of opposite concepts such as rational - irrational, objective - subjective, abstract - contextualized. Olsen then argues that the sexualization and hierarchization of these concepts take place. The former concepts, that is rational, objective and abstract, are associated with masculinity and the latter with femininity. The masculine concepts are placed over those associated with femininity in a hierarchical manner. In addition, Olsen points out that the law is given a masculine identity through its association with masculine concepts, such as rationality and objectivity. Olsen states

according to the dominant ideology, law is male, not female. Law is supposed to be rational, objective, abstract and principled ....., like men, it is not supposed to be irrational, subjective, contextualized or personalized, like women.(1990:201)

After illustrating this understanding of the constitution of modern (American) society, Olsen identifies three possible feminist strategies which challenge the dualism prevailing in society. One strategy is to “reject the sexualization of the dualisms” through the rejection of “the normative claim that women should be irrational, passive, etc.”(1990:202). The problem of this strategy, in Olsen’s views, is that, by challenging the normative claim of women, it implicitly accepts “the hierarchy of rational over irrational, of active over passive, etc.” Olsen links this



strategy with the liberal feminist approach in the legal regime. The second strategy identified by Olsen is to “reject the hierarchy but accept the sexualization” (1990:203). This strategy focuses upon “women’s experience” and “women’s culture, psychology, imagination, or language”(1990: 204), showing a clear connection between this strategy and the patriarchal structuralist approach toward the law.

The third strategy is to reject “both the sexualization of the dualisms and the hierarchy of rational, objective, etc. over irrational, subjective, etc.” (1990: 204). Olsen claims that this strategy draws on the idea of androgyne based upon an identity combining both genders. She brings the framework of androgyne to understanding the nature of the law, claiming that the law has both masculine and feminine aspects since it is rational as well as irrational, and objective as well as subjective. Therefore, according to Olsen, defining the law as male has highlighted only the masculine characteristics of the law and subjugated its feminine sides (1990: 208). Finally, Olsen argues, the feminists’ task is to bring both sides of the law into equal terms and to dismantle its one-sided masculine appearance. Based on the idea of androgyne, she advocates the rejection of “the dualistic opposition between men and women” and the hierarchy between the two, and to “disrupt conventional sex roles” (1994:204).

Olsen makes a valuable point concerning the hierarchy of the two binary concepts and the inadequacy in perceiving the law as male, which is a useful idea in understanding how a pair of concepts, for example, full-time and part-time

employment, are constructed in the law. The former which is associated with masculinity is considered as a superior form of employment to the latter which is given feminine identification. It should be noted, however, that, although Olsen claims that feminine associations are generally considered as inferior to masculine features, the hierarchical location of these concepts actually depends on the field in which these concepts are placed. On the one hand, feminine associations are usually considered as inferior to masculine ones in the field of employment where masculinity is the norm. On the other hand, in the field of family and care, it can be argued that masculine and feminine associates are first given different terms, for example, not objective but “distant” and not subjective but “sympathetic” and these are then located in a different order in the hierarchy, so that the feminine-associate concept, “sympathetic” is superior to the masculine-associate concept, “distant”.

Moreover, Olsen proposes the construction of a new subjectivity of men and women based upon the idea of androgyne. This proposal needs to be considered critically. The problem is that it is difficult to see whether and how the law, founded on the idea of androgyne, can alter the subjectivity and/or the current situation of women. It is questionable how many women would be able to relate their own subjectivity with the notion of androgyne on which Olsen attempts to build up a feminist legal theory. Such a notion seems to be very remote from the daily experiences of women who have to face issues surrounding such matters as pregnancy and childbirth at work and home. Furthermore, it is not clear how the law of androgyne deals with these gender specific issues. In the United States, pregnancy has been often considered as a variation of temporary disabilities

equivalent to illness and there were no legal provisions for maternity leave at the federal level until very recently (Conaghan, 1993:7; Willborn, 1994: 164-165)<sup>2</sup>. This approach can be argued as less gender-specific, that is androgynous, but should be criticised in terms of pathologizing pregnancy, which is clearly not a disability nor an illness. This example demonstrates the limitations of a refusal to acknowledge basic biological differences between the sexes under such concepts as androgyne in the law. As Cockburn argues, there is no need for women to deny their difference from men for the sake of equality as long as “women are the ones who [are] able to say when “difference” is relevant” (1991:9)

The approach which I intend to use for the analysis of discourses surrounding women’s part-time work in the employment and legal institutions is based upon Smart’s framework on the discursive power of law which helps to produce gendered difference and upon Olsen’s analysis of discursive construction of gendered hierarchy. Using these ideas, I will show that, first, the difference between full-time and part-time employment is constructed on both labour-related and gender-related grounds, and second, the difference is placed within a hierarchical structure. In doing so, I will argue that the differentiation of full-time and part-time employment is not simply a matter of different patterns of employment but is an expression of gendered hierarchy which is brought about by the discursive power operating in the legal and employment institutions.

## **Conclusion**

Each category of feminist analyses has made a specific contribution to revealing the nature and operation of law in relation to unequal gender relation. The first category of liberal analyses pointed out the unequal treatment of women based on a male-biased perception of women in the law. The second patriarchal structuralist approach underlined the importance of questioning the conventional assumption of law and analysing it in relation to existing unequal gender relations. The third group of post-structuralist approaches highlighted the discursive power of the law as a prominent force which produces and reproduces the gendered subject and gendered concepts as well as the gender hierarchy, reshaping the male-dominated social order.

While these analytical frameworks are of great relevance to any area of legal studies, it is necessary to examine how each approach can be adopted in different areas in more detail. In subsequent chapters, I will attempt to adopt a post-structuralist feminist approach in the area of employment since it has become clear that statutory rights and protections alone can achieve only limited improvement for women and the law in this area must be examined beyond its rules and regulations. In this context, it is important to analyse the nature of the law in relation to the disadvantaged position of women in the labour market and society more generally. Particular attention will be paid to the power of the legal discourse which constructs the legal subject, legal concepts and gendered hierarchy, in such a way as to produce and reproduce the unequal power relations between the sexes.

In this study, the law is conceptualised as one of the most important discursive mechanisms of hierarchical gendering in British and Japanese societies. Through the power of discourse, the law gives to the legal subject and legal concepts a particular gender and a location within the gendered hierarchy. As will be discussed in following chapters, part-time employment is a gendered concept that is constructed as women's, while it is also constructed as inferior to full-time employment which is constructed as men's. An effect of this hierarchical gendering is the "legitimised" concentration of women in inferior part-time employment. More importantly, this arrangement makes it possible for men to reap advantages both in the labour market as more privileged workers and at home as those whose reproductive needs are met by their female partners, while providing employers with a more flexible and exploitable labour force.

The next chapter will shift its focus from the law to part-time employment in Britain and Japan, looking at how this pattern of employment is defined in the two countries, how part-time employment is organised in each labour market and what are the structural constraints outside of the labour market, which draw a great number of women into this particular pattern of employment in both countries. The examination of statistical data confirms the feminisation of part-time employment, its lower pay in comparison to full-time employees, and the persisting sexual division of labour at home. As pointed out above, these clearly show the current situation in which part-time women workers find themselves in the two countries, to the creation of which the law has contributed greatly.

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<sup>1</sup> There are some feminists, though relatively few in number, who adopt the new feminist legal approaches and investigate other fields. For example, see, Pertersen, 1989 (employment law in Sweden); Holtmaat, 1989 (labour law in the Netherlands); Frug, 1992 (contract law in the United States); and More, 1993 (employment law in the EU) and O'Donovan, 1993 (family law).

<sup>2</sup> The law previously required employers who provided temporary disability leave for employees to give leave for pregnant women. But this only covered women who worked at the workplace where such leave schemes for ill employees were already implemented (see Keegan, 1988: 189-193). However, in 1994, the Family and Medical Leave Act was enacted which require public employers and private employers with more than 50 employees to provide up to 12 weeks unpaid leave for their employees who are ill, give birth to or adopt a child, and need to care for seriously ill immediate family members (Willborn, 1994).

## **CHAPTER 3: CHARACTERISTICS OF PART-TIME/*PATO***

### **EMPLOYMENT IN BRITAIN AND JAPAN**

#### **Introduction**

This chapter aims: first, to define the key concepts for this study, full-time/formal and part-time/*pato* employment; second, to examine the positions of part-time/*pato* employees in the labour markets; and third, to explore structural factors outside of the labour markets, which draw more women than men into part-time/*pato* employment, in Britain and Japan. In doing this, I will demonstrate the conceptual difference of part-time employment in the two countries and a close connection between this and the different structural formation of part-time employment. In addition, the examination of structural factors provides grounds on which I can critically analyse the managerial and legal discourses of part-time employment and the employees in it in subsequent chapters.

The chapter is divided into three sections. The first section discusses how part-time employment is defined in Britain and Japan, revealing that part-time employment is conceptualised in a different way in each country. The different conceptualisation of part-time employment has been produced by and also helps to reproduce the different structures of the two labour markets. While part-time employees are considered as a peripheral labour force in both Britain and Japan, in Britain the core labour force consists of regular full-time employees while in Japan it consists of formal employees. Examining the distinct segmentation of each labour market, I

point out that in Britain part-time employment is constructed on the basis of working hours whereas in Japan it is on the basis of contractual employment status.

The second section provides comparative data concerning part-time/*pato* employment in the two labour markets, looking at the number of part-time/*pato* employees, industrial and occupational distribution, working hours and pay. This shows the feminisation of this particular pattern of employment, the concentration of part-time/*pato* employees in service industry and in a narrow range of occupations, and the considerably lower pay compared with that of full-time/formal employees. The different conceptualisation of part-time employment in the two countries is clearly reflected in the different level of working hours of part-time/*pato* workers in each country. In Britain, where part-time employment is defined in terms of its shorter working hours, part-time workers indeed work on average much shorter hours than both British full-time employees, and Japanese *pato* workers. On the other hand, in Japan where *pato* employees are defined by contractual employment status, there are employees who work as long as their formal counterparts and the average working hours of *pato* employees are much longer than their British counterparts.

The third section examines the social contexts of the two countries in which part-time employment operates, paying particular attention to the division of labour at home in order to put forward an alternative way of understanding women's participation in part-time work and to problematize the explanation based on "women's choice". In both Britain and Japan, there are structural difficulties which



prevent many women from participating in the labour market on a full-time or formal basis. By pointing to this aspect, I am not denying that there are some women who can indeed freely choose to be part-time employees. What I wish to emphasise here is that the representation of part-time employees as those who have freely chosen to work in this way is constructed on a particular and rather small constituency of part-time/*pato* women employees.

### Methodological Issues in Using Statistical Data

There are some methodological issues which need to be raised prior to the presentation of statistical data in this chapter. First, workers are categorised in different ways in Britain and Japan and, therefore, each comparative group is not constituted from the same pool of workers. For example, although the categories of full-time employees in Britain and formal employees in Japan are treated as comparable groups of employees between the two countries, they do not overlap completely. Moreover, the definitions of part-time employment given by the main British and Japanese statistics differ. For example, in the British Labour Force Survey (BLFS) and the Japanese Labour Force Survey (JLFS), the former employs the self-assessment method and the latter adopts the working hours criterion of less than 35 per week. These points will be discussed in detail in the next section.

Secondly, there is a discrepancy in the definitions of *pato* employees in the two major sources of data used in this study for the Japanese side, the JLFS and the Survey of Part-time Employment 1990. Although the JLFS provides the main official statistical data for labour-related studies, it adopts the definition of part-

timers as those who work less than 35 hours per week, excluding a large number of *pato* employees who work longer than this criterion. On the other hand, the most comprehensive survey of part-time employees, the Survey of Part-time Employment 1990, was conducted in 1990 by the Ministry of Labour [ML], Policy Planning and Research Department in the Minister's Secretariat [PPRD] and published in 1991 (ML, PPRD, 1991). The Survey utilises a definition of *pato* employees as both those who actually work shorter hours and those who are identified and treated as *pato* at the workplace. This definition reflects the actual practice at work and provides separate information on the "genuine" and "disguised" categories of *pato* employees, which are not available from any other official sources (the concepts of "genuine" and "disguised" *pato* employees will be explained in the next section). This survey is, however, a one-off special report featuring *pato* employment and therefore, does not provide information for long-term and more recent trends.

This study needs to utilise both the JLFS and the Survey of Part-time Employment 1990 despite the different definitions of *pato* employment in order to minimise the shortcomings of each survey. As far as the regular statistical data are concerned, I collected the latest information available in Summer 1994 when the research for this study was conducted in Japan. However, I use the 1990 data of the regular survey when it is necessary to use these alongside data from the Survey of Part-time Employment 1990 in order to maintain consistency. Similarly, when drawing comparisons between Britain and Japan, I use the British data which are taken from the comparable year to the Japanese data.

Thirdly, the data concerning wages have to be handled very carefully in both Britain and Japan since these heavily underestimate the extent of lower pay amongst some groups of workers. The main source of the data on employees' earnings in Britain is the New Earnings Survey. Its sample "comprises all those whose National Insurance numbers end with a specified pair of digits" (DE, NES, 1990: the Description of the Survey). This means that those who do not have National Insurance numbers, and they are likely to be the lowest paid workers, are excluded from the Survey. The exclusion of lowest paid workers from the Survey affects particularly the results relating to wages of part-time women employees. This problem is recognised by the Survey itself which states in Notes for Contents that

Results for part-time employees are affected by the exclusion of employees who are not members of PAYE schemes..... Those excluded will tend to be employees whose earnings are below the income tax threshold and nearly all will be part-time. It is estimated that about one quarter of all part-time employees, most of whom are women, are not covered by the survey for this reason. (DE, NES, 1990: F(iii))

Indeed, hotels whose managers agreed to provide the information concerning pay in my fieldwork in Britain quoted rates which were below the average of hourly wages shown in the Survey despite the fact that the majority hotels chosen for the fieldwork belonged to international or nation-wide hotel chains which were run as listed public companies (see Chapter 4). This certainly indicates that the extent of low pay amongst workers is not fully exposed in the New Earnings Survey.

In Japan, the Survey of Part-time Employment 1990 (ML, PPRD, 1991) also provides data on wages of *pato* employees who worked in establishments of five or more employees. Regular information on wages amongst employees in Japan is provided by the Policy Planning and Research Department in the Minister's Secretariat, Ministry of Labour, which provides an annual report called *Chingin-kozo-kihon-chosa-hokoku* - the Basic Survey on Wage Structure, which also surveys establishments of five or more employees. This means that the smallest private establishments where the level of pay is often much lower than in larger establishments are excluded from the major surveys.

Finally, it is not easy to compare the situations of part-time/*pato* women employees outside of the labour markets in Britain and Japan through statistical data either. In this study, three surveys are used: the survey of reasons for working on a part-time/*pato* basis; of the labour force participation rate of women by age of the youngest child; and of division of household tasks. These surveys are not comparable in an exact sense between Britain and Japan. For example, in the first survey, the choices made available to part-time women employees to answer why they work part-time are different in Britain and Japan. In the second survey, age categories of the youngest child are not comparable. The third survey was carried out in a very different format in each country: in Britain the questions asked who mainly did what kind of domestic tasks whereas in Japan the survey asked how many hours husbands and wives spent in various domestic tasks. These obviously raise methodological questions of comparability. However, what I wish to demonstrate from these surveys is an overall picture of the situations of part-

time/*pato* women workers in each country, identifying the unequal distribution of domestic work between the sexes which can be observed in both Britain and Japan. For this purpose, the examination of those surveys will be useful in spite of the differences in the details of the methods and designs.

Bearing in mind these methodological problems in utilising statistical data to illustrate and compare the situations of part-time/*pato* women employees in Britain and Japan, I proceed to the examination of how full-time and part-time employment are defined and conceptualised in Britain and Japan. This will demonstrate how closely the methodological issue of definition is related to the substantive issue of this study, how part-time employment is constructed and organised in each society.

## **1. Defining Part-time Employees**

### *The Concepts of Part-time and “Pato” Employment*

From the English terms “part-time” and “full-time” employees, it is usually assumed that they are divided on the basis of working hours. In Britain, however, there are neither legally fixed full-time working hours nor an exact threshold of working hours leading to the definition of part-time employment. The British Labour Force Survey (BLFS) mainly adopts the method of self-assessment in which respondents are invited to decide whether they are part-time or full-time workers themselves. Until Autumn 1995, it used the criterion of 30 hours per week to categorise “people who were on government work-related training programmes” into full- or part-time. This has changed since the Survey of Winter 1995/96 to the self-assessment method (DE, BLFS Historical Supplement, 1996: 5).

In Japan, the Labour Standard Law (LSL) 1945 sets the maximum fixed working hours of 44 per week for full-time employees (Art. 32, LSL, which sets out 44 hours per will be eventually reduced to 40 hours per week). However, this does not mean that 44 hours per week is the criterion used to divide employees into full- and part-timers. This is because the Law of Part-time Employees (PEL) 1993 defines part-time employees vaguely as those who work shorter hours than their formal counterparts without providing a specific threshold of working hours, that is, it is a relative, not an absolute, distinction (Art. 2, PEL, see Chapter 6). Despite the lack of a clear legal threshold of working hours, the Japanese labour Force Survey

(JLFS), which is widely used in Japan, adopts the criterion of less than 35 hours per week to define part-time workers.

However, the definition of part-time employees based on working hours is particularly problematic in Japan as many part-time employees work more than 35 hours per week. The most comprehensive survey of part-time employees, the Survey of Part-time Employees 1990, defined part-time employees as both those who worked shorter hours than their formal counterparts and those who were treated as part-timers within the establishment irrespective of their working hours. Under this definition, the survey found as many as 20 per cent of part-time employees surveyed worked almost as long hours as their formal counterparts. Their working hours often exceed 35 hours per week and, therefore, they do not appear as part-time workers under the JLFS which adopts the weekly 35 hour threshold.

The term which is often used to refer to part-time workers in Japanese is “*pato*” (derived from the English “part-timer”), and this term includes both workers who work shorter hours and those who are called and treated as such at their workplaces despite being employed on a full-time basis. In this study, these two groups of *pato* employees are differentiated by calling the former “genuine *pato*” and the latter “disguised *pato*”.<sup>1</sup> Although it is incompatible with the legal definition of part-time employees given in the PEL 1993, the inclusion of disguised *pato* in the category of *pato* employees has been widely observed in employment institutions in Japan. For

example, disguised *pato* employees were identified in several hotels in which I conducted interviews in Japan (see Chapter 4).

The inclusion of “full-time” workers in the category of *pato* employees obviously casts doubt on the application of the “British” (or “Western”) concept of part-time work to the situation of *pato* employees in Japan. In Britain, the number of working hours is the factor which differentiates part-time and full-time work, and these concepts form a binary opposition from the viewpoint of working hours. On the other hand, in Japan working hours are one, but not an essential, factor in classifying workers as *pato* since it is also possible to classify those who do work on a full-time basis as *pato*. This also demonstrates that *pato* employment is not an opposing concept to full-time work in the way that the English concepts of full- and part-time work are.

What, then, is the factor which makes it possible to classify workers who are employed on a full-time basis as *pato* and what is the opposing concept to *pato* in this sense? To answer this question, it is necessary to turn to an examination of the overall labour market structures in Britain and Japan.

### *The Concepts of Full-time and “Formal” Employment*

C. Leadbeater argued that the economic changes in Britain in the 1980s brought a “fivefold segmentation of the labour market” through the creation of a large number of long-term unemployed and the expansion of peripheral workers. The five



divisions were: the long-term unemployed; the short-term unemployed; peripheral workers: the unskilled outer core; and skilled inner core workers. The peripheral workforce, according to Leadbeater, consists of part-time workers, temporary workers, home workers and the self-employed (1987:18-20). Here it should be emphasised that Leadbeater sets out two criteria for the classification of core workers: that is regular and full-time employment. This suggests that working full-time is one of the two crucial elements in identifying core workers. Leadbeater also claims that the core labour force should be further divided into unskilled regular full-time workers who are positioned in the outer core and skilled regular full-time workers who are in the inner core. The gap in pay, Leadbeater argues, has widened in the 1980s between outer and inner core workers and workers in the former group are much more vulnerable to economic changes while those in the latter group enjoy “stable employment prospects” often on a permanent basis (1987:20).

It should be emphasised that these divisions are not created in a gender-neutral manner since women are more likely than men to be peripheral workers. In 1992, 76 per cent of all male workers in employment were full-time employees, who are counted as the core workforce, while 51 per cent of all women workers were in this category (DE, BLFS Quarterly Bulletin, June 1993: 15). The existence of a large number of part-time women employees is an important factor since they are the largest group amongst the peripheral workforce in the British labour market. In this context, a binary conception of part-time and full-time employment not only encompasses the number of working hours but also represents to a significant extent the division between the core and peripheral workforce.

In Japan, employees are widely divided into the “formal” and “informal” categories of workers based on the terms and conditions of employment. Kazumi Matsui, the head of the Women’ Bureau, the Ministry of Labour, at that time, describes the five criteria which should be used to identify formal employees. He claims “according to common sense” that formal employees are those who are: 1)employed without any specific period of employment; 2)paid by monthly salary not by hourly wages; 3)receive substantial amounts of semi-annual bonuses; 4) given wages increases and promotion regularly; and 5) receive severance payments (Matsui, K., 1993: 6). Employees who do not meet all these requirements are considered as informal. Here special attention should be given to the following two points. First, four out of the five conditions concern how employees are remunerated, and amongst these four remuneration conditions, two, regular wages increases and promotion and severance payments, suggest that the pay structure for formal employees is linked with long-term employment, assumed in the employment contract without any specific period of employment. From this point of view, it can be said that the status of formal employees is primarily determined by the employment contract on the basis of their long-term employment. Second, Matsui did not cite full-time working hours as a requirement of being classified as formal employees. I will come back to this point later.

These formal employees are further divided into two categories; those who are under the so-called “life-time” employment system and those who are not. Workers who are within this system are expected to stay with one company for an extended period, in some cases for an entire career, and are promoted internally. The life-time

employment system most commonly operates amongst male workers who are recruited by large companies at the time of the completion of their formal higher education and stay in the company without any interruption until retirement. Although many commentators argue that “life-time employment” (called by some “long-term employment commitment”) is a marked feature of Japanese employment relations, a great deal of disagreement can be observed as to how inclusive and widespread this system is in reality (Ito, 1992: 210-224). Many commentators point out that most women in formal employment and some formal male employees, particularly those employed in medium and small-sized enterprises, do not enjoy life-time employment. Therefore, despite being in formal employment, these employees are not as privileged as formal male employees in large Organizations (for example, see Sano, 1983; Kawashima, 1987; Chalmers, 1989; Steven, 1990) although the extent of such differentiation cannot be confirmed since there are no such statistics available.

In this view, formal employees who are excluded from the life-time employment system can be considered as part of the peripheral workforce alongside informal employees, such as *pato* employees, dispatched workers (so-called “temps”), day labourers (those who are employed on a daily basis or for a period of less than one month), workers with a limited period of employment, casual workers, and self-employed. However, the position of formal employees, even if excluded from the life-time employment system, usually entails much better benefits, especially in pay and job security, than their informal counterparts (see Section 2 of this chapter and

Chapter 6). This suggests that there is a clear differentiation between formal employees outside of life-time employment and informal employees.

Having outlined the Japanese labour market structure, I will now use Leadbeater's framework of British labour market segmentation to describe the segmentation of the Japanese labour market. The Japanese labour market exhibits a fourfold segmentation: the first consists of inner core workers, consisting of formal employees inside the life-time employment system; second, outer core workers, comprising formal employees outside life-time employment; third, peripheral workers, including informal employees and the self-employed; and fourth, those who are unemployed, although this last segment is relatively small in Japan. Men and women are clearly segregated in the structure of the Japanese labour market as well as the British labour market.

Tables 3-1a and 1b show the actual number of workers in each category in Britain and Japan in 1992. From this table, the total number of peripheral workers can be roughly estimated as 8,843,000 in Britain and 24,280,000 in Japan by excluding the total number of full-time employees from the total number of workers in employment. Amongst these peripheral workers, part-time women employees were 4,508,000 in Britain and 5,920,000 in Japan. This means that in Britain these part-time women employees accounted for 51.0 per cent of all peripheral workers ( $4,508,000/8,843,000$ ) and in Japan 24.4 per cent ( $5,920,000/24,280,000$ ). Although the proportion of part-time women employees amongst peripheral workers in Britain appears much higher than in Japan, as discussed earlier, the JLFS

Table 3-1a: Employment Structure in 1992, Britain

(thousands)

	Male	Female	Total
Employees Full-time	10,670	5,696	16,366
Part-time	646	4,508	5,154
Total Number of Employees*	11,318	10,206	21,524
Self-employed	2,368	770	3,138
Family Workers**	53	126	179
Government Employment & Training Programmes	245	124	369
Total Workers in Employment*	13,983	11,226	25,209
Deduct Full-time Employees	10,670	5,696	16,366
Total Peripheral Workers***	3,313	5,530	8,843

Source: The British Labour Force Survey Historical Supplement, April 1993, p.3, p.5

\* Figures do not add up due to the existence of workers who did not declare their employment status (whether employed or self-employed and/or full-time or part-time).

\*\* Family workers in Britain are unpaid.

\*\*\* Peripheral workers are those who are in employment but not in regular full-time employment, that is, part-time, self-employed, family workers and trainees.

Table 3-1b: Employment Structure in 1992, Japan

(thousands)

	Male	Female	Total
Employees Full-time*	28,120	13,380	41,500
Part-time*	2,760	5,920	8,680
Total Number of Employees**	31,450	19,740	51,190
Self-employed	5,800	2,630	8,430
Family Workers***	810	3,750	4,560
Total Workers in Employment**	38,990	26,790	65,780
Deduct Full-time Employees	28,120	13,380	41,500
Total Peripheral Workers****	10,870	13,410	24,280

Source: The Japanese Labour Force Survey in the Ministry of Labour, White Paper on Labour 1993, pp.334-335. The Ministry of Labour, Women's Bureau, *Hataraku josei no jitusjo* (Report on Working Women) 1993, Appendix 68

\* Full-time employees in Japan are those who work 35 hours or more per week and part-time employees are those who work less than 35 hours. Therefore, full-time employees includes formal and *pato* who work 35 hours and more per week.

\*\* Figures do not add up due to the existence of workers who did not declare their employment status (whether employed or self-employed and/or their working hours).

\*\*\* Family workers include both paid and unpaid workers.

\*\*\*\* Peripheral workers are defined as those who are in employment but not in formal employment in the text, that is *pato*, self-employed and family workers. However, the JLFS' definition of full-time employees includes both formal and disguised *pato*, therefore, the number of the peripheral workers here calculated based upon the JLFS is an underestimate.

counts a large number of *pato* employees as full-time since they work more than the criterion of 35 hours per week and, as a result, this reduces the number of *pato* employees. Nevertheless, a feature common to both countries is that women who are employed on a part-time or *pato* basis represent the largest group of the peripheral workforce.

However, in Japan, working full-time is not cited by Matsui above as one of the requirements necessary to categorise a worker as being in formal employment. Indeed, the Survey of Part-time Employment 1990, found that 2.6 per cent of all surveyed *pato* were classified as formal *pato* employees (ML, 1991: 6, 48-49). This demonstrates that just as full-timers can be *pato* employees, that is, disguised *pato*, part-timers can be in the category of formal employees, and that the number of working hours is not an absolute determinant to be considered as formal employees.

In reality, however, as shown above, a mere 2.6 per cent of *pato* employees were treated as formal employees. Indeed, the great majority of *pato* employees are treated as informal as opposed to formal employees. There are also other categories of informal employees, namely dispatched workers, day labourers, employees with a limited period of employment and casual workers. These informal employees are, however, much fewer numbers than *pato* employees and are defined more specifically than *pato* employees based on one of the employment conditions attached to them. For example, dispatched workers are defined by working through agents and day labourers must be employed for a period of less than one month. In this context, the term *pato* is used to refer to the largest group of informal

employees excluding smaller and more specific groups of informal employees, such as dispatched workers and day labourers. As a result, they are seen as being representative of informal employees more generally. This means that *pato* is not a concept which is formed on the basis of working hours and, therefore, is not in opposition to full-time employment. On the other hand, although in theory, *pato* can be in the category of formal employment, very few *pato* are in reality treated as formal employees. This suggests that *pato* employment can be seen as being paired with and opposite to formal employment.

Now, as discussed above, formal employment in Japan is largely determined by the five factors given by Matsui. These factors are specified in employment contract as terms and conditions of employment on the assumption of the long-term employment commitment. *Pato* employees are treated in a different way from their formal counterparts at the workplace according to their different contractual employment status and are recognised as informal employees in opposition to formal employees. This means that the concept of *pato* in Japan should be understood as a definition based on contractual employment status rather than how many hours they work. This conceptualisation of *pato* makes it possible to include disguised *pato* who work on a full-time basis in the category of *pato* employees.

In sum, the different ways in which workers are categorised in Britain and Japan clearly pose a methodological problem since the comparability of such basic concepts as full-time/formal and part-time/*pato* employment is questionable. However, this is more than a methodological problem since it reflects and

illuminates the different conceptual formation and structural organisation of an apparently common pattern of employment, part-time employment, in each society. More importantly, it demonstrates that part-time employment is indeed constructed within a specific set of circumstances and its meaning and conceptual formation vary according to the specific context. The very different way of categorising, defining and conceptualising each group of employees can be seen to have a direct connection with the very different structure of the labour market and the structural formation of part-time employment within it in each country. I will now go on to examine how part-time/*pato* employment is structured in the British and Japanese labour markets.



## **2. Part-time/*Pato* Women Employees in the Labour Market**

This section provides an overall picture of the structures of part-time/*pato* employment in the British and Japanese labour markets and draws some comparison between them, focusing upon the growth of part-time/*pato* women employees, in what kind of industries and occupations they are found, their working hours, and the level of pay.

### *The Number and Growth of Part-time/Pato Employees*

In 1992, 53 per cent of women of 16 years of age and over in Britain and 51 per cent of 15 and over in Japan were economically active (DE, BLFS Quarterly Bulletin, June 1993: 17; ML, WB, JLFS, 1993: Appendix 5). The great majority of these women workers were employees, both in Britain and Japan. In the same year, 91 per cent of women workers were employees in Britain and of these women employees, 44 per cent were categorised as part-time employees. On the other hand, only 6 per cent of male employees were part-timers (DE, BLFS Quarterly Bulletin, June 1993: 14-15). In the same year in Japan over 75 per cent of women workers (excluding those in the agricultural sector) were classified as employees<sup>2</sup> and 30.7 per cent of these women were *pato* employees who worked less than 35 hours. Only 9 per cent of male employees were in this category (ML, WB, JLFS, 1993: Appendix 10-11, 68). It should, however, be noted that, as discussed in the previous section, the total percentage of *pato* women employees, including both

genuine and disguised category, is higher than this figure (see also note 3 in Chapter 1).

The gender-specific growth of part-time employees is striking in both Britain and Japan. The actual total number of part-time employees has increased in the United Kingdom from 3.4 million in 1971 to 6.0 million in 1992. Amongst these, 2.8 million, 82 per cent, in 1971 and 4.8 million, 80 per cent in 1992, were women (DE, Employment Gazette Historical Supplement No.4, 1994: 7, 11). In Japan, the total number of *pato* employees of less than 35 hours per week has increased from 2.2 million in 1970 to 8.7 million in 1992 and amongst these, 1.3 million, 59 per cent, in 1970 and 5.9 million, 68 per cent, in 1992 were women (ML, WB, JLFS, 1993: Appendix 68). This means that part-time/*pato* women workers accounted for 20.5 per cent and 11.8 per cent of all British and Japanese employees respectively in 1992.

### *Industry and Occupation*

The largest group of part-time/*pato* women workers in both countries was in the service industries, close to 90 per cent in Britain and 70 per cent in Japan. In Britain, approximately 60 per cent of women part-time employees were almost evenly spread over the following three occupational categories: clerical and secretarial; personal and protective services; and sales occupations (DE, BLFS 1992/93 in Employment Gazette November 1993:489). In Japan, 35 per cent, the largest group, of *pato* women, were found in the wholesale and retail industry, 6 per

cent in the financial, insurance and real estate industries and 29 per cent in other miscellaneous service industries in 1992 (ML, WB, JLFS, 1993: Appendix 69).

In both Britain and Japan, a large number of part-time/*pato* women workers has been recruited to service industries which have expanded to become the largest industrial sector in the post-war period. A marked difference between the two countries appears in the numbers of women in manufacturing industry. Over 25 per cent of women *pato* employees in Japan were found in manufacturing industry while only 8 per cent of those in Britain were in the same sector (DE, BLFS 1992/93 in Employment Gazette November 1993:489; ML, PPRD, 1991: 52-53). This may reflect the relative strength of Japanese manufacturing industries, especially in the areas of electronics and micro-chips where many women are recruited as line workers (for the percentages of employment provided in secondary and tertiary industries, see note 2 of Chapter 1).

### *Working Hours*

In Britain, although a great variety of working hours can be observed amongst part-time employees, the average for part-time women employees of all occupations in 1990 was 19.4 hours per week (DE, NES, 1990: F178-2). In contrast, in the same year, *pato* women employees in Japan worked much longer hours than those in Britain. Even in the case of genuine *pato* women employees (excluding students who work part-time), the average working hours were 28.7 hours and 5.2 days per

week (ML, PPRD, 1991:197). The average weekly working hours of disguised *pato* women employees amounted to 42.8 hours and 5.6 days per week on average.

Although in both Britain and Japan, there was a tendency for those in manufacturing industries to work longer than those in service industries, this tendency was clearer in Japan than in Britain. In Britain, the average weekly working hours of part-time manual and non-manual women employees in manufacturing industries were 22.5 and 21.5 respectively while those of part-time manual and non-manual women employees in service industries were 17.9 and 20.0 (DE, NES, 1990: F177-1 and F177-2). In Japan, *pato* employees in manufacturing industries worked on average 35 hours per week while the average weekly working hours amongst those in service sectors ranged from 29.7 hours per week in retail, sales and restaurants to 28.2 in miscellaneous service industries (ML, PPRD, 1991:204-205).

The long working hours of *pato* women employees in Japan makes it very difficult for *pato* employment to be conceptualised in the same way as part-time employment in Britain. However, as discussed in Section 1 of this chapter, part-time employment in Britain and *pato* employment in Japan must be regarded as different concepts encompassing different types of employees. Moreover, I will argue that the difference in working hours of part-time/*pato* workers in the two countries is not only reflected in the different concepts of part-time and *pato* employment in Britain and Japan but also is a production of the different constructions of part-time and *pato* employment in the two countries in that part-time employment in Britain is

constructed on the basis of working hours whereas in Japan *pato* employment is constructed on the basis of contractual employment status.

### *Pay*

It is also difficult to make a precise comparison in pay between full-time/formal and part-time/*pato* employees, or between the two countries since there are many other factors which contribute to the different levels of pay. However, both in Britain and Japan, part-time/*pato* workers generally receive a much lower rate of pay in comparison to their full-time/formal counterparts. For example, in Britain, in 1990 the average gross hourly earnings (excluding overtime pay) of full-time female employees were £5.30 while that of part-time female employees was £3.95, 74.5 per cent of the earnings of their full-time women counterparts (DE, NES, 1990: D 87-3, F 178-2). In reality, the pay differential between them would be larger since the lowest paid part-time employees were excluded as discussed earlier in this chapter.

Alex Bryson (1989) argues that the pay of female part-timers in the U.K. deteriorated during the 1980s compared with that of female full-time workers, irrespective of whether manual or non-manual jobs are surveyed. Bryson also estimates that 82.2 per cent of female and 79.5 per cent of male part-time workers earned below the “decency threshold” of the Council of Europe, which was 68 per cent of average full-time earnings at that time. According to him, part-time workers, who made up just under one-quarter of the workforce, comprised over 42 per cent

of all workers, full-time or part-time, who were classified as being low-paid (Bryson, 1989: 37-45). The legal safety net for the problem of low pay has been removed with the abolition of the Wages Councils in the Trade Union Reform and Employment Rights Act 1993. The National Pay Equity Campaign argues that this move has a disproportionate influence upon women part-time (as well as full-time women) workers. This is because the Wages Councils covered some of the lowest paid industries, such as shop work, hotel and catering, clothing manufacturing, hairdressing and laundries (NPEC, 1991; 1), where many women part-timers find their employment.

In Japan, the Minimum Wages Law 1959 (fundamental amendment carried out in 1985) provides minimum rates of pay for all workers, including *pato* employees. Although *pato* employees are legally protected from being exploited by being paid lower than minimum wages, this has not brought the large wage gap between formal and *pato* women employees closer. In 1990, formal women employees earned ¥994 per hour on average<sup>3</sup> while *pato* women employees, including both genuine and disguised categories, earned ¥669 per hour on average, 67.3 per cent of formal women employees (ML, PPRD, 1991: 136-137; ML, 1993: 366).

As with the British situation, Mihoko Tsuda argues that the gap in fixed hourly wages of formal and *pato* women workers between 1976 and 1987 has increased in Japan (1991:181). In addition to the gap in fixed wages, a larger differential is reported in bonuses, which formal employees commonly receive as a high proportion of their regular remuneration twice a year. While the bonuses make up a

large part (15-30 per cent) of annual income of formal employees (Ito, 1992:231-237), there are many *pato* employees who do not receive bonuses at all. According to Mihoko Tsuda, *pato* women employees receive on average only 16.5 per cent of the bonuses of formal women employees. Furthermore, Tsuda gives a sample calculation which demonstrates that companies can save annually ¥770,000 (£4,800) on average if a formal employee is replaced by *pato* workers. This is mainly achieved through savings in fringe benefits, as many *pato* employees can be excluded from social security and other benefits contributed to or provided by firms for formal employees (Tsuda, 1991: 181-182).

The gap in pay between full-time/formal and part-time/*pato* employees clearly highlights the divisions between women workers themselves alongside the division between the sexes in the two labour markets. This demonstrates a need to analyse the position of women at work by taking diversity amongst women workers into account without losing sight of sexual inequality. Incidentally, from the latter point of view, it should be noted that in both Britain and Japan women in full-time/formal employment are paid less than male full-time/formal employees. For example, in 1992 women in full-time employment in Britain earned 79 per cent of the hourly wages of full-time male employees on average (DE, NES, 1992: A8-12, A9-7) while women in formal employment in Japan received only 58.9 per cent the actual amount of monthly pay of their male counterparts (ML, BW,1993: Appendix 48). This suggests that sexual inequality can be observed in the gap in pay between men and women in full-time employment as well as in the much greater number of

women than men who are in part-time/*pato* employment and who receive a significantly lower level of pay than those in full-time/formal employment.

Having examined some of the structural features of part-time/*pato* work in the British and Japanese labour markets, including its numbers and growth, feminisation, concentration in the service sector, differences in working hours and levels of pay, I will now look at some of the factors outside of the labour market which affect the position of women in part-time/*pato* employment.



### **3. Part-time/*Pato* Women Employees outside the Labour Market**

In this section, I explore the social contexts of women who participate in part-time/*pato* employment in Britain and Japan. In doing this, I critically examine the thesis of “women’s choice” which emphasises that women freely choose to work part-time/*pato* despite the disadvantages entailed in this pattern of employment, notably lower pay and less job security in comparison to those of full-time/formal employees. It should be also emphasised that the notion of freedom of choice is legally important since one of the most important presumptions of the law is that the legal subject (those who are bearers of rights and duties) is an independent and reasonable “person” who is capable of making decisions in their own best interests (for the explanation of this legal personality, see Naffine, 1990: 75-77). Under this assumption, “choice” carries a significant consequence for part-time/*pato* women employees since this notion has the effect of legitimising their disadvantaged position at work.

#### *Domestic Responsibility*

The high participation of women in part-time/*pato* employment is widely explained as a result of women’s voluntary “choice” by the current British and Japanese Governments, employers and various commentators. Gary Watson and Barbara Fothergill, as examined in detail below, pursued an argument based on the findings of the Labour Force Survey that women in Britain “choose to work part-time because of domestic responsibility” but not because of the lack of full-time jobs

(1993: 213). Norman Bonney insists that “part-time paid work has emerged in many countries as an alternative to full-time employment as a way of allowing partners, usually *the female one, to engage in paid labour while undertaking the care of children and primary domestic responsibility*” (Emphasis added) (1995:1). Atsushi Kiyoe also contends that Japanese housewives choose to work on a *pato* basis in order to combine family responsibility and waged work although they could take a formal job if they wished to do so (1993: 15) as will be discussed in detail in Chapter 6.

A common feature of these commentators’ claims is that women “choose” to work part-time/*pato* because of their domestic responsibility and, therefore, their lower pay and status is somehow justifiable. This view, however, does not question why it is women who take domestic responsibilities and what is the alternative to part-time/*pato* employment for women who carry domestic responsibilities. In order to consider these questions, I now examine more closely Watson and Fothergill’s evidence for the British case, and, then, the equivalent data for the case of Japan.

In 1991 the British Department of Employment issued a brochure entitled “The Best of Both Worlds” in which the British Government urged employers to establish “the right image of a *family-friendly* working environment” (DE, 1991b: 4) by offering more flexible working practices such as part-time work to their “employees”. Although the brochure does not specify the sex of employees who might participate in more flexible working patterns, the implication is clear from photographs and cases of individual companies in it. Furthermore, the following

statement has been made by Ann Widdecombe, the Junior Employment Minister at the time:

We already have a good story to tell on employment prospects *for women* as a result of our *flexible working market*, which enables *people* to work the hours they want and still *meet their family responsibilities* (Emphases added). (Financial Times, 16th March 1995)

Again, it is questionable to assume that “people” means men and women equally and that the flexible working market is for men and women in the same way. The Japanese Government also repeatedly emphasised the importance of *pato* employment for women, particularly those who wish to return to the labour market after a certain period of child-rearing. (This point will be discussed further later.) It states that

*Pato work is a pattern of employment which can be chosen by women who wish to return to the labour market, combining paid work and family life.*

..... In order to help women to return to the labour market, it is necessary to improve working conditions of *pato* work and to make the most use of *women's* skills and experience through the re-employment of them in the same company [where they previously worked] (Emphases added) (ML, 1993: 25).

These governmental views from both countries clearly show that part-time/*pato* employment is chiefly promoted as a working pattern for women with family responsibilities. In fact, in 1992/3, 82 per cent of part-time women employees were married or cohabiting women in Britain, and the same figure, 82 per cent in 1990

pertains in Japan (DE, BLFS in Employment Gazette, November 1993: 495; ML, PPRD 1991: 94-95). This indicates that part-time/*pato* employment is not an expected working pattern for men and single women but predominantly for women with families. However, a question remains: should the phenomenal growth of part-time/*pato* employment amongst women be understood primarily in terms of “women’s choice” particularly when a large gap in pay is observed between them and full-time/formal employees? Against this doubt, those who support the view of women’s choice strongly argue that these women freely “choose” part-time/*pato* working for their convenience, using findings in surveys as below.

In Britain, 83 per cent of part-timers answered that they worked part-time because they “do not want a full-time job” while only 9 per cent of them said that it was because they “could not find a full-time job” (BLFS in Watson and Fothergill, 1993: 215). It can be, however, argued that this survey does not provide the crucial information concerning why these 83 per cent of part-time women employees “do not want a full-time job”. Watson and Fothergill quoted earlier, recognised this gap and presented another survey carried out in 1991 in Britain which provided more detailed choices to respondents (1993: 216).

Table 3-2a shows the percentage of women who selected each of nine provided choices. The largest group, 31 per cent, selected the response that they worked part-time because “working part-time allows more time to spend with my children” and 14 per cent said that they “would like a full-time job but domestic commitments would make full-time working too difficult”. There is some doubt whether these

Table 3-2a: Reasons for Working Part-time rather than Full-time in Britain (per cent)

Working part-time allows more time to spend with my children	31
Would you like a full-time job but domestic commitment would make full-time working too difficult	14
Would like a full-time job but cannot find one	7
Student/still at school	9
Full-time job too difficult due to illness or disability	2
No need to work for financial reasons but work part-time through choice	14
Need to earn money but earn enough working part-time so no wish to work full-time	13
Some other reasons	8
Don't know	2
Total	100

Source: Watson and Fothergill, 1993: 216

two responses indicate a choice on the part of the respondents, as opposed to a decision based on a set of domestic constraints. In this survey, women who are relatively free from constraints and, therefore, clearly work part-time through choice can be seen to be only 27 per cent, comprising those who selected “no need to work for financial reasons but work part-time through choice”, 14 per cent, and “need to earn money but earn enough working part-time so no wish to work full-time”, 13 per cent (Watson and Fothergill, 1993: 216).

In spite of that, Watson and Fothergill support their claim that women choose to work part-time, by placing those who work part-time because of domestic responsibility, particularly those who provide care for children, in the category of “voluntary” part-timers along with those who appear to have genuine choice. Watson and Fothergill also support their argument by using the data collected through group discussions with selected part-time women workers. They claim that

For many women, part-time working offered a satisfactory compromise between *their wish to look after their children* and *their desire to work* [for income, social contact, self-esteem] (Emphasis added). (1993: 218)

It seems that, in their view, childcare alongside waged work, is something women can choose to do or not to do according to their wish. An obvious question is what is the alternative choice if women do not wish to look after their children by themselves? The alternatives could be to rely upon their male partners, family or the state, all of which are of limited use. More crucially, this kind of question is almost exclusively posed to working mothers but rarely to working fathers. Furthermore, Watson and Fothergill themselves appear to be at odds with their claim that “most respondents *choose* part-time because of domestic responsibilities (emphasis added)” when they reported that

Respondents [part-time women workers] were also keen to emphasise that child care was not just a short period in their lives - even when children went to school, illness, and holidays meant that, for many, part-time work was the *only viable option* which fitted potential needs and beliefs with practical solutions (Emphasis added). (1993: 218)

It is difficult to say that there is a choice if women see part-time employment as “the only viable option”. Ignoring the point made by women reflects a problem which arises from a combination of the attribution of labour in the sphere of reproduction to women and the lack of acknowledgement of the extent of the contribution made by women in this sphere.

Table 3-2b: Reasons for Taking *Pato* Work in Japan (multi-choice; per cent)

Would like to work specific hours	58.9
Would like to shorten working days or hours	31.7
Domestic or childcare responsibility	23.1
Responsibility to care for the ill and elderly	2.3
No stamina to work as formal employees	9.2
Could not find a formal job	17.5
Interested in the job	17.1
Can leave work easily	13.5
Friends work <i>pato</i>	11.1
Good wages and working terms	10.9
others	15.5

Note: This adds up to more than 100% because respondents could tick more than one answer.

Source: The Ministry of Labour, Policy Planning and Research Department, the Minister's Secretariat, The Survey of Part-time Employees 1990, 1991:116-117

In Japan, Table 3-2b shows the result of a multiple-choice question in the Survey of Part-time Employment 1990. (The percentages quoted below cannot be added since more than one answer was selected by *pato* women employees.) The most popular reason, selected by 58.9 per cent of all *pato* women employees, including both disguised and genuine categories of *pato*, was that they “wanted to work in the time which is convenient for them” and the second, selected by 31.7 per cent, was because they “wanted to work shorter hours and/or fewer days”. These two responses, however, do not indicate the reasons why they wanted to work at particular times or fewer hours and days. On the other hand, 23.1 per cent selected “domestic or childcare responsibility”, 2.3 per cent “responsibility to care for the ill and elderly”, 9.2 per cent said they “have no stamina to work as formal employees” and 17.5 per cent answered that they “could not find a formal job” (ML, PPRD, 1991: 116-117). These responses can be seen as indicating constraints which made these women participate in *pato* rather than formal employment.

The strong emphasis upon women's choice can be more problematic in Japan than in Britain because of the following two reasons. Firstly, a much bigger proportion, 17.5 per cent, of *pato* women employees in Japan answered that they work *pato* because they cannot find formal jobs in comparison to 6 per cent in Britain. Not surprisingly, the proportion who selected this answer goes up amongst disguised *pato* employees to 33.2 per cent (ML, 1991:126-127). Secondly, as demonstrated below, domestic responsibility seems to fall on Japanese women more heavily than British women because of the sharper division of labour at home in Japan.

Table 3-3a shows how British married couples divided household tasks between them in 1991 (CSO, Social Trends 25, 1995: 32). Although some tasks appear to be more equally shared between the sexes in 1991 than in 1983 when the same survey was carried out previously, many domestic chores were still performed by women and there is a large discrepancy between the actual allocation of tasks and what the couples think that it should be. Moreover, in opposition to the trend shown by this survey toward the more equal sharing of domestic work between the sexes over the years, another more recent study shows that men are actually taking less responsibilities at home due to their increasingly longer working hours in the 1990s (Guardian 4th November 1996).

Table 3-3b indicates the average hours spent in each activity by married couples, both of whom worked as employees in 1991 in Japan (ML, WB, 1993: Appendix 63). On weekdays, women spent 3 hours 48 minutes on average on domestic chores, childcare and shopping while men only spared 12 minutes on these



Table 3-3a: Division of Household Tasks, in 1991, Britain

	Actual allocation of tasks			How tasks should be allocated		
	mainly man	mainly women	shared equally	mainly man	mainly women	shared equally
Household Shopping	8	45	47	1	22	76
Makes evening meal	9	70	20	1	39	58
Does evening dishes	28	33	37	12	11	76
Does household cleaning	4	68	27	1	36	62
Does washing and ironing	3	84	12	-	58	40
Repairs household equipment	82	6	10	66	1	31
Organises household money and bills	31	40	28	17	14	66
Child rearing						
Looks after sick children	1	60	39	-	37	60
Teaches children discipline	9	17	73	8	4	85

Source: The Central statistic Office, Social Trends 25, 1995: 32

Table 3-3b: Division of Household Tasks, in 1991, Japan  
Households of both husband and wife are employees

	Weekdays (hours)		Sundays (hours)	
	Wives	Husbands	Wives	Husbands
Sleep	7.01	7.29	7.52	8.25
Work	10.38	10.03	6.53	3.36
Paid Work	6.03	8.39	1.29	2.20
Domestic work	3.05	0.06	3.56	0.24
Childcare	0.14	0.02	0.22	0.10
Shopping	0.29	0.04	0.54	0.26
Commuting	0.43	1.12	0.09	0.14
Pleasure	3.40	4.09	6.16	9.19
TV, radio	1.37	1.51	2.14	3.31
Resting	1.03	1.03	1.22	1.43
Hobby	0.13	0.20	0.42	1.30
Socialising	0.11	0.20	0.35	0.40

Source: The Basic Survey of Social Life, in The Ministry of Labour, Women's Bureau, *Hataraku josei no jitsujō* (Report on Working Women)1993, Appendix 63

\*The time spent by husbands to do domestic work is likely to be overestimated since this excludes households where women stay at home.

activities. The inequality between the sexes in Japan is clear as wives sleep less, rest less on Sundays, and spend less time on pleasure, from watching TV to socialising with other people, than their husbands. Under these circumstances, if Japanese women with family want or need to work, their choices are either the heavy double burden of domestic and paid work on a *pato* basis or the heavier double burden of domestic and paid work on a formal basis. Although some women are coping with the latter, the existence of these women is not compelling evidence for the existence of a real choice for women, rather it shows the existence of the clear exploitation of women's labour.

### *Childcare Responsibility*

Although the provision of care for the other members of the family is often included in domestic responsibility, this should be examined separately from everyday chores. This is because providing care adds a special burden on women and is one of the important factors which affects the pattern of women's participation in the labour market. I should like to look at the relationship between childcare and part-time/*pato* work, although care for elderly, disabled and ill members of the family is also increasingly one of the most pressing issues in both Britain and Japan.

In Britain, Table 3-4a shows that in 1993, 50.9 per cent of women aged 16-59 with the youngest dependent child of between 0 and 4 years of age were economically active as were 72.0 per cent of women with the youngest child of between 5 and 10, and 79.8 per cent of women with the youngest child of 11 and 15. Furthermore,

**Table 3-4a: Economic Activity by Age of Youngest Dependent Child amongst Women of Working Age (16~59) in 1993, Britain (Per cent)**

Women aged 16-59	70.7	
Age of youngest child		
0-15	63.3	
0- 4		50.9
5-10		72.0
11-15		79.8
Women without dependent child	75.9	

Source: BLFS in Department of Employment, Employment Gazette, November 1993: 496

**Table 3-4b: Economic Activity by Age of Youngest Dependent Child amongst Women in Non-agricultural Sector, in 1993, Japan (per cent)**

Age of youngest child	
0-3	28.0
4-6	49.7
7-9	63.4
10-12	66.7
13-14	71.7
15-17	71.2

Source: JLF Special Survey, in The Ministry of Labour ,Women's Bureau, *Hataraku josei no jitsujō* (Report on Working Women) 1993, Appendix 25

36.0 per cent of women workers with dependent children were part-timers, while 22.9 cent of women workers without dependent children were in the same category (DE, BLFS, Employment Gazette, November 1993: 496). In Japan, Table 3-4b shows that only 28.0 per cent of women with the youngest child of between 0 and 3 years of age were economically active. The proportion gradually increased to 49.7 per cent, 63.4 per cent, 66.7 per cent, 71.7 per cent of women with the youngest child of between 4 and 6, 7 and 9, 10 and 12, between 13 and 14 respectively, and a slight decline to 71.2 per cent amongst women with the youngest child of between 15 and 17. Approximately half of women employees with children under 17 years of

age worked less than 35 hours per week, while 30 per cent of all women employees did so (ML, WB, JLF Special Survey, 1993: Appendix 25).

The lowest economic activity rates are observed in both Britain and Japan amongst women with pre-school age children although there is a large difference between women in the two countries. In Britain (Table 3-4a), over half of the women in this group remain economically active and, when children start to attend school at 5, the difference between women with and without dependent children in economic activity disappears. On the other hand, in Japan (Table 3-4b), the great majority of Japanese women are out of the labour market especially until their children become 3 years of age when they can be admitted to nursery education. Many women continue to stay home until their children start to attend primary education at the age of 6, as reflected in the second lowest labour force participation rate amongst women with children of between 4 and 6 years of age.

The very low level of economic activity amongst Japanese women with young children may suggest that *pato* employment is more likely to be a means for women to return to the labour market after their children start schooling rather than a means for them to remain in the labour market. On the other hand, it is more likely in Britain that part-time working is a way for women to continue to be in the labour market throughout the periods of child-rearing although many women in Britain also stop working during the earlier period of child-rearing, as suggested by the drop in the rate of economic activity amongst women in this phase. This may give a partial explanation of the tendency toward longer working hours amongst women

*pato* employees in Japan than their counterparts in Britain since women *pato* employees in Japan can afford to spare more time for waged work than those in Britain because their children are older. On the other hand, it can be argued that the longer working hours of *pato* employment have driven women with very young dependant children out of the labour market altogether in Japan.

In Britain, the lack of adequate public childcare facilities for pre-school children is often blamed as the main obstacle to women remaining in the labour market or full-time work. In 1988, publicly funded childcare places were available only for 2 per cent of children under 3 and for 2 per cent of children aged between 3 and 4, although 45 per cent of the latter group of children attended pre-schooling mainly on a part-time basis (Moss, 1990: 35). This point is especially emphasised in comparison to some other EU member countries, such as France where more comprehensive public childcare services are available and more women participate in full-time employment (for example, Dex, Walters and Alden, 1993; O'Reilly, 1994).

In the case of Japanese women, although the insufficiency of publicly-funded childcare services is one of the important factors in deterring women from remaining in the labour market (Mizuno, 1991:254-258), this problem appears less acute than in Britain. This is because since the early 1970s, there has been a successful movement initiated by women demanding more public childcare provisions before primary school age. As a consequence, in 1988, there were 22,781 childcare facilities; including 9,318 private facilities which were partly

subsidised by the Government. In these facilities approximately 1,680,000 children were admitted (Mizuno, 1991:256), which was over 25 per cent of the total number of children under 4 years of age. This suggests that there is a necessity to explore other explanations for the low continuity rate of employment amongst married women in Japan.

A sharper division of labour at home in Japan than in Britain can be counted as one of the important reasons for the low continuity of employment amongst women in Japan as discussed above. Psychological pressure on women to stay at home for children also deserves attention as this cannot be solved by the social provision of childcare. Again these pressures, which are supported by the particular discourse of children's welfare, are put on working mothers but not on working fathers. In both Britain and Japan many working mothers stated that they feel guilty when they leave their children in the hands of childminders or in childcare facilities (Watson and Fothergill, 1993: 218; Ueno, 1990:243-248). This can be seen as an expression of their anxiety in not conforming to the ideal model of the caring mother.

Finally, it is essential to consider the fact that some Japanese women are able to find a full-time job but not a formal job in the labour market where the life-time employment system operates. Although the pure form of life-time employment, under which an employee stays within one company from the completion of formal education to retirement, can be observed amongst a relatively small number of workers, long-term employment practice prevails in Japan (Koike, 1989) This practice limits the mobility of workers severely both between firms and in and out of

the labour market, making it difficult for many women to return as formal employees after a career break for bearing and rearing children. As a result, some women are forced to return to the labour market as *pato* employees whose pay and job security are substantially inferior to those for formal employees. In this way the practice of long-term employment can be seen as a system which excludes women from privileged formal jobs.

Here I am not trying to suggest that there is no element of choice in women's part-time/*pato* work. I am, however, questioning the unexamined assumption that part-time/*pato* work is mainly a matter of choice, rather than a decision made by women within a set of constraints, since real choice for women only exists if there are alternatives to childcare and domestic work. My argument is that the argument of "women's choice" is not only inadequate as an explanation for the growth in and conditions of part-time/*pato* employment but also forms a discourse which obscures the structural constraints women face and shifts the blame to women themselves.

To summarise this section, there are many factors both inside and outside the labour market which ostensibly lead women to "choose" to work part-time/*pato* in a specific social context. In this section, the argument of women's choice is critically examined in terms of the unequal sexual division of labour at home, a factor which operates outside the labour market in both British and Japanese societies. It is women who are more or less expected to perform work related to human reproduction, including daily repetitive chores and care for children and others in the family in the two societies. This is clearly demonstrated in the fact that it is

women, not men, who have to combine domestic responsibility and waged work in both countries.

On the other hand, different social contexts in Britain and Japan lead to the different formation of part-time employment. This is apparent in the different patterns of labour participation of women with dependent children in the two countries: while there is a tendency for part-time employment to be taken up by women with young dependent children in Britain, in Japan more women leave the labour market during the early period of child-rearing and afterwards re-enter as *pato* workers. Some possible explanations for this were explored in terms of the lack of state provision of child-care in Britain and the extent of the sexual division of labour at home in Japan. It is also underlined that women who take a career break may have difficulty in finding formal jobs because of the prevailing long-term employment practice in Japan, and be forced to become *pato* employees.



## Conclusion

This chapter has identified similarities and differences in part-time/*pato* employment and in the social contexts surrounding women workers in Britain and Japan. The similarities observed between the two countries can be summarised as follows. First, part-time/*pato* employees are a part of the peripheral workforce whose working conditions such as pay are considerably poorer than full-time/formal employees who are considered as the core workforce. Second, part-time/*pato* employment is a highly feminized pattern of employment and, in particular, the great majority of participants in it are women with families. Third, the largest proportion of these women is concentrated in the service industries. Fourth, a wide pay discrepancy is observed between those in full-time/formal and part-time/*pato* employment. Finally, this pattern of employment operates within a context in which the sexual division of labour at home allocates domestic work to women although the degree differs in both countries. What these similarities mean is that in both countries, part-time/*pato* employment is not just a different pattern of employment within the labour market, in other words it is not a “neutral” or value-free difference in forms of labour. On the contrary, it means that part-time/*pato* work has great political significance and is actually a social production based upon power difference and inequality. Its feminisation combined with its peripherality make it one of the crucial means by which women’s subordinated position in the labour market and in the family is reproduced.

On the other hand, despite the generally similar image of part-time and *pato* employment as women's work in both Britain and Japan, there are important differences in the formation of these. First, part-time and *pato* employment are conceptualised markedly differently in the two countries. In Britain the key factor in defining part-time employment is working hours, in opposition to full-time employment, while in Japan the concept of *pato* employment commonly includes both genuine, who actually work shorter hours and disguised *pato* employees, who work full-time hours, demonstrating that working hours are not the absolute determining factor.

The second point, which is closely related to the first point, is the different structures of the British and Japanese labour markets. While regular full-time employees are considered as the core workforce in Britain, in Japan the core workforce comprises formal employees who meet the following requirements; employed without any specific period of employment, paid by monthly salary, given wages increases and promotion regularly, and provided with semi-annual bonuses and severance pay. This has created a category of disguised *pato* employees who work as long as formal employees but are defined and treated as *pato* because they cannot meet one or more of these requirements. This shows that the formal or *pato* status is determined by contract, and therefore, the concept of *pato* employment is opposite not to full-time, but to formal employment in terms of their differing contractual employment status.

Third, a different distribution of part-time employees amongst industrial sectors can be identified since there is a much greater number of *pato* employees in Japan than in Britain who participate in the manufacturing sector. Fourth, generally *pato* women employees in Japan work much longer hours than their counterparts in Britain, and this tendency is particularly clear amongst those in manufacturing industries. Fifth, part-time employment is more likely to be taken up by women with young dependent children in Britain than in Japan since more women in Japan than in Britain leave the labour market altogether during the early period of child-rearing and come back to the market, often as *pato* workers. The career break, however, may entail serious disadvantages for women in Japan in finding formal jobs at the time of re-entrance to the labour market due to the practice of long-term employment which operates in a way that excludes women from better-paid and more secure formal employment.

The significance of these differences is that part-time/*pato* work cannot be attributed entirely to individual choice but needs to be understood in its social context. The differences in the two countries show that part-time/*pato* work has developed in socially and historically distinct ways associated with the different labour market structures, conditions of employment, patterns of economic activity and organisation of domestic work, all of which have produced different conceptualisations and understanding of part-time/*pato* work. So although part-time/*pato* employment in Britain and Japan share some similarities, they also hold distinct characteristics. This chapter has highlighted the differences in the way this pattern of employment has developed in the two countries, with particular reference

to the conceptual differences between part-time and *pato* employment, and how these differences reflect the different structures and social contexts of part-time and *pato* employment inside and outside the labour market in Britain and Japan. Bearing in mind this overall picture, I should like to proceed to the next chapter in which part-time/*pato* employment is discussed in the employment context in Britain and Japan, focusing upon the discourses produced in relation to this pattern of employment by employers and managers, which differentiate and legitimise the less favourable treatment of women workers.

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<sup>1</sup> The Survey of Part-time Employment 1990 divides *pato* employees into A *pato* and B *pato*. The former is the groups of *pato* employees whose working hours are indeed shorter than their formal counterparts, whereas the latter is the groups of *pato* employees who work as long as their formal counterparts. Mari Osawa (1994) writes that B *pato* is commonly called as *giji-pato* in Japanese (1994:35), which can be translated into English as quasi-part-timers or disguised part-timers. Others, such as Michie Takashima (1990), calls B *pato* as full-time part-timers. This study uses genuine and disguised *pato* for A and B *pato*.

<sup>2</sup> More women in Japan than in Britain were categorised as family workers who work in family businesses, including both paid and unpaid workers.

<sup>3</sup> There are no official figures for hourly wages for formal employees since they are remunerated by monthly salary. So that I estimated them by the following method. Formal female employees earned ¥ 175,000 on average per month in 1990. The LSL sets out the maximum working hours of 44 per week for formal employees. This means that formal employees work approximately 176 hours per month (44 hours per week x 4 weeks) and then, the monthly average earning of ¥175,000 is divided by 176 hours.

## **CHAPTER 4: PART-TIME/*PATO* EMPLOYMENT IN EMPLOYMENT INSTITUTIONS IN BRITAIN AND JAPAN**

### **Introduction**

This chapter analyses discourses surrounding part-time/*pato* employment and the employees in it, which were identified in statements put forward by managers in the fieldwork conducted in the form of interviews in Britain and Japan.

As discussed in Chapter 2, the main aim of this study is to examine the law as a discursive mechanism of hierarchical gendering in relation to the part-time/*pato* employment of women, using the framework developed by Smart and Olsen. However, this discursive mechanism of the law cannot be fully accounted for without considering the interactive operation of legal discourses with employers' discourses of part-time/*pato* employment and employees in it. This is because employers are one of the most powerful groups in both British and Japanese societies, who have direct interests in the ways in which part-time/*pato* employment and the employees in it are constructed and regulated through the law.

As will be seen in this Chapter, employers attempt to legitimise the disadvantaged position of part-time/*pato* employees by insisting that they are different from and inferior to full-time/formal employees. This construction of part-time/*pato* employees in employment institutions is of great relevance to the legal construction of these employees since the employment and legal institutions are two of the most

important sites where the discourses of part-time/*pato* employment are produced, and discursive power operates interactively between these two institutions. Because of this, it is of prime importance to identify the set of discourses relating to part-time/*pato* employment produced and circulated by employers in the employment context, and the relationship between the employment and legal institutions in creating the disadvantaged position of part-time/*pato* women employees through the discursive mechanism of hierarchical gendering.

The managers interviewed put forward various arguments in order to emphasise the different and inferior quality of part-time/*pato* employees as workers and/or their different and lesser value to business in comparison to full-time/formal employees. These arguments create the hierarchical and gendered differentiation of employees where full-time/formal employees are placed in a superior position over part-time/*pato* employees. This hierarchy of employees legitimises the less favourable treatment of part-time/*pato* employees at work, which in turn reinforces such hierarchy.

Two distinct groups of managers' arguments can be identified: one focuses upon apparently gender-neutral labour-related factors, such as working hours, length of service, job content, responsibility and commitment, while the other focuses upon gender-specific factors, such as the characteristics of men and women, and the gendered domestic position of part-time/*pato* employees based upon the recognition that the majority of part-time/*pato* employees are women with families. What I will do in this chapter is to elucidate the discursive process where by part-time/*pato*

employees are constructed as inferior to and/or less valuable than full-time/formal employees by examining the two groups of labour-related and gender-related arguments in turn.

I will analyse the discursive creation of difference and hierarchy between full-time/formal and part-time/*pato* employment based upon the apparently gender-neutral grounds of quantitative differences in the form of working hours and length of service, and qualitative differences in the form of job content, degree of responsibility and level of commitment. A two-stage process can be identified here: at the first stage, managers identify and create a difference between the two forms of employment, and at the second stage they position these differences within a hierarchical structure. Managers do not stop at a simple description of the different features of full-time/formal and part-time/*pato* employment, but in the second stage of the discursive process, they evaluate the differences as a means of placing the two forms of employment in a hierarchical relationship with each other.

Both stages are crucial to the discursive construction of part-time/*pato* employment because without the initial stage of differentiation between full-time/formal and part-time/*pato* employment, there would be no grounds for the second stage of evaluating the difference. At the same time, without the evaluation of differences, the managers' statements would only describe the contrast between full-time/formal and part-time/*pato* employment, but provide no grounds for treating part-time/*pato* employees less favourably. My analysis, however, shows that both differentiation and the subsequent evaluation of the differences are a product of managerial



discourse which helps to construct part-time/*pato* employment as inferior to full-time/formal employment. Taking each aspect of the discourse in turn, I will challenge both grounds for differentiation as well as the judgements attributed to the difference. This will show that the discourse operates in a way that conceals the structural conditions of part-time/*pato* employment and legitimises the less favourable terms and conditions of *pato* employment. Since I regard these managerial arguments about the difference of part-time/*pato* employment as discourse, I refer to these statements about working hours, length of service, job content, responsibility and commitment as the labour difference discourse.

After examining the labour difference discourse which creates the hierarchy of full-time/formal and part-time/*pato* employment based on apparently gender-neutral labour-related factors, I will proceed to the analysis of the second group of arguments. Using Smart's and Olsen's framework, I will identify the discursive process of gendering the hierarchical differentiation of full-time/formal and part-time/*pato* employment and employees. In fact, in the employment context, this is not a clearly separate process in the construction of the inferiority of part-time/*pato* employment (in contrast to the legal context), but intricately intertwined with the construction of the hierarchy of these two employment patterns based upon the apparently gender-neutral labour difference discourse.

I will show that neither the differentiation nor the hierarchization of full-time/formal and part-time/*pato* employment is a gender-neutral process but that managers see both the quantitative and qualitative differences of part-time/*pato* employment as

deeply gendered, and that the inferior value they attached to part-time/*pato* employment on the basis of these differences is equally gendered. Managers allocated certain jobs to full-time/formal or part-time/*pato* employees on the basis of specific feminine and masculine characteristics, differentiated these employees on the basis of the gendered domestic positions of men and women, and created the hierarchy on the grounds of the evaluation of these gender differences. Firstly, managers suggest that women's part-time/*pato* jobs require not skill but natural feminine characteristics, in comparison to some other jobs which are mainly performed by full-time/formal male workers. Secondly, they assume the position of full-time/formal male workers in the family as husbands and fathers with no domestic responsibilities who can therefore give priority to waged work, whereas part-time/*pato* women's position in the family is assumed to be as wives and mothers who do carry domestic responsibilities and must give priority to the family.

I refer to managers' arguments about the gendered characteristics of jobs and the gendered domestic positions of full-time/formal male and part-time/*pato* female workers as the gender difference discourse. I first challenge this discourse by suggesting that particular jobs require not gendered characteristics but skills that can be acquired by either sex, and that the skills possessed by women are undervalued because of their feminine association. Second, I challenge this discourse by suggesting that domestic responsibilities can be undertaken by spouses and parents of either sex although in practice they are mainly undertaken by women. What can be seen here in managerial discourse is neither a natural and necessary division of labour by sex, nor a free choice in favour of inferior work by women, but

the operation of power in the everyday construction of part-time/*pato* and full-time/formal employment. It should be noted that I am not disputing the fact that the majority of part-time/*pato* women employees are wives and mothers, but questioning their gendered domestic position as wives and mothers, which allocates responsibility for domestic and parenting work to women but not to men. I use the term “gendered domestic position” to make this clear.

This chapter is divided into four sections. Section 1 outlines the research method for the fieldwork conducted in Britain and Japan and some structural findings from it. After explaining briefly the setting of the research, I illustrate the ways in which employees were categorised in the actual workplace of local hotels in each country, applying the concepts of full-time/part-time in Britain and formal/*pato* employment in Japan as introduced in Chapter 3.

Following this, I analyse arguments put forward about part-time/*pato* employment and the employees in it by the managers interviewed; those which form the labour difference discourse in Sections 2 and 3, and those which compose the gender difference discourse in Section 4. The labour difference discourse is revealed in two important features to which the managers most frequently referred: one is quantitative differences which are based upon the lesser input of part-time/*pato* employees in terms of time, deriving from their shorter working hours and/or shorter period of employment. The other is qualitative differences in such factors as job content, responsibility and commitment. These arguments are used by the managers to establish the inferior quality and value of part-time/*pato* employees

compared with their full-time/formal counterparts. Section 2 looks at arguments which emphasise quantitative difference and Section 3 those which highlight qualitative difference.

In Section 4, the gender difference discourse is identified from two aspects of managers' arguments. First, employers' stereotyped view of gender differences is revealed by looking at the gendered construction of certain jobs and the gender-specific allocation of these jobs by employers. In doing this, I also show the heavy allocation of part-time/*pato* employees to a wide range of so-called women's jobs. This arrangement reinforces, and is influenced by, the feminine identification attached to part-time/*pato* employment. I then examine the direct linkage made by the managers between the alleged inferior quality of part-time/*pato* employees and their gendered domestic position as mothers and wives. Through the analysis of this gender-specific differentiation of part-time/*pato* employees, I will demonstrate the crucial importance of gender in shaping the structure of part-time/*pato* employment at the workplace.

## **1. Research Method and Structural Findings**

This section first describes the method adopted in the fieldwork, explaining the rationale for selecting the hotel industry and how individual establishments were chosen in Britain and Japan. It then discusses the way in which employees were categorised and differentiated in the British and Japanese establishments surveyed, alongside some structural findings, such as the numbers of employees in each category and pay. These provide background information prior to the analysis of discourses of part-time/*pato* work in the employment context. In Britain, the research was conducted in the early Summer and late Autumn of 1994 in and around Stratford-upon-Avon (population: 22,000) involving 14 establishments. In Japan, the fieldwork was carried out in late Summer and early Autumn of 1994, involving 19 establishments in a resort town, Shirahama (population: 20,000), located in the southern part of the Kii peninsula in the Kansai region. The economies of both localities chosen for the fieldwork depend largely upon tourism. In addition to these, in Japan an interview was conducted in Summer 1994 with a representative of the Nikkeiren - the Japan Federation of Employers' Associations in order to gain a more general picture of personnel policies supported by employers.

### The Selection of Industry and Location

The largest industrial sector in both Britain and Japan is now not manufacturing but the service sector (see note 2 in Introduction). Despite this, there are very few studies available in English concerning employment practices for women in non-manufacturing sectors in Japan (but see Lam, 1991). As discussed in Chapter 3, the majority of part-time/*pato* women employees in the two countries are found in this sector. The importance of the service sector and the concentration of women in part-time/*pato* employment in this sector in both Britain and Japan were the two most important factors for selecting this sector for fieldwork. The possibility of studying various service industries was considered, including retailers, hotels and catering establishments. Amongst these, the hotel industry was chosen because of a wide range of jobs offered within each establishment, such as cleaning, catering and retailing, which are widely perceived as “women’s jobs” and, indeed, carried out by women and those on a part-time/*pato* basis in both Britain and Japan. In addition, the research was conducted in smaller tourist centres, Stratford-upon-Avon and Shirahama, in order to focus upon local women’s part-time/*pato* labour and avoid hotels in large cities, such as London and Tokyo, which rely heavily upon foreign labour and workers from other parts of the country.

### The Selection of Establishments

Information about hotels in and around Stratford-upon Avon was obtained from the local tourist information offices and in Shirahama from the Shirahama Tourist

Association. From this information, 20 of the largest establishments were selected and requested to co-operate with the research. In Britain, the criteria used in terms of size led to the inclusion of only hotels of more than 20 guest rooms, including single, double and twin rooms. In Japan establishments of 19 rooms and more were included. Very small establishments were excluded from consideration in order to avoid those run solely by a single family and/or relatives.

The managers of these 20 hotels in each country were requested to complete a questionnaire and participate in interviews with the author. In Britain, 13 hotels agreed to complete a questionnaire and be interviewed by the author and one hotel wished only to return the questionnaire without interview. One manager or the owner was interviewed in each hotel. Of these, four establishments were independent and the rest belonged to hotel or business groups. The largest establishment was equipped with 116 rooms while the smallest had 22 rooms. The job titles of those interviewed varied, including general managers, proprietors, a deputy general manager, a senior assistant manager, personnel managers and a financial controller, but all had an overview of staffing policies. The interviews with them lasted typically for about an hour.

In Japan, with the assistance of the Mayor of Shirahama who provided a letter in which hotel managers were asked to cooperate with the author's research, 17 establishments agreed to complete the questionnaire and be interviewed by the author; two hotels consented to fill in the questionnaire only; and one declined both. The 17 establishments which cooperated fully with the research were as follows:

seven were locally owned independent hotels and inns; three hotels belonged to local business groups which have expanded their business beyond running hotels; one belonged to a nation-wide hotel chain; one hotel belonged to the Mitsui group, which is one of the six largest enterprise groups - *keiretsu* - in Japan; four were under new management, taken over by companies whose principle activities are not in hotel management; one was managed by the Wakayama Prefecture Agricultural Cooperative.

The largest hotel surveyed in Shirahama had 274 rooms with a capacity of 1319 guests and the smallest one had 19 rooms with a capacity of 96 people. It should be noted that a Japanese-style room often accommodates a whole family, typically four to six people. If the establishments have more Japanese-style rooms, their capacity in terms of the number of guests becomes much larger than that which would be calculated by the assumption of two guests per room. In Shirahama, western style hotels are also equipped with some Japanese-style rooms, which increases their guest capacity. Interviewees numbered 19, including owners, a managing director, general managers, deputy general managers, managers of general affairs, deputy managers of general affairs, and a section chief of general affairs; as in the UK, all had an overview of staffing policies. The interviews lasted between 30 minutes to two hours.

The questionnaire, which was the same format in Britain and Japan, was handed to the managers to collect general information such as the number of employees by sex, their fixed weekly working hours, the availability of training, the use of casual



workers (see the questionnaire in Appendix). Based on the information provided in the questionnaire, interviews were conducted, focusing especially on how the managers saw and understood part-time/*pato* employment and the employees in it. In what follows, every interviewee is referred to as “manager” regardless of position, to maintain anonymity.

### *Categories of Employees*

In both countries, employees were divided into three categories in the questionnaire: regular full-time/formal, regular part-time/*pato* and casual employees - including both full-time and part-time workers. Here “regular” employees means those who are employed on a regular basis to differentiate them from casual employees. The classification of employees into these categories was left to the managers and there was almost no question concerning this point from them, except from one Japanese manager. Tables 4-1a and 4-1b respectively show the numbers of regular full-time and part-time in Britain, and formal and regular *pato* employees in Japan by sex within the establishments surveyed. In Britain, there were 529 regular full-time and 219 regular part-time employees in the 14 establishments surveyed. Excluding one hotel, which had no sex breakdown of employees available, women constituted 52.5 per cent of regular full-time and 70.8 per cent of regular part-time employees. In Japan, there were 1579 formal and 290 regular *pato* employees in 19 establishments, and 50.1 per cent and 63.4 per cent of each category of employees were women.

Table 4-1a: Regular Full-time and Part-time Employees of 14 Hotels by Sex in Britain

Hotel	Full-time		Part-time		Total
	Male	Female	Male	Female	
A	55	35	0	6	96
B	2	3	1	2	8
C	25	22	5	5	57
D	20	16	9	28	73
E	3	8	1	6	18
F	1	3	0	4	8
G	21	34	2	3	60
H	14	17	8	15	54
I	12	15	4	12	43
J	30	40	5	15	90
K	9	21	5	8	43
L	8	9	5	6	28
M	24	25	4	9	62
Total Employees (Full-time/Part-time, Male/Female)	224	248	49	119	640
%	35.0%	38.8%	7.7%	18.6%	100%
Total Employees (Full-time/Part-time)	472		168		640
%	73.8%		26.3%		101%*
Hotel N**	57		51		108
Total Employees including Hotel N (Full-time/Part-time)	529		219		748
%	70.7%		29.3%		100%

\* More than 100% due to rounding.

\*\* Hotel N is separated since it did not provide the number of employees in each category by sex.

Table 4-1b: Formal and Regular *Pato*\* Employees of 19 Hotels by Sex in Japan

Hotel	Formal		<i>Pato</i>		Total
	Male	Female	Male	Female	
A	74	85	9	3	171
B	8	12	0	10	30
C	40	42	4	10	96
D	56	31	6	5	98
E	43	45	13	15	116
F	110	101	7	13	231
G	56	53	8	18	135
H	80	80	0	8	168
I	30	38	18	18	104
J	7	18	4	4	33
K	60	75	8	24	167
L	10	16	0	4	30
M	16	22	3	2	43
N	27	16	1	8	52
O	90	90	10	20	210
P	39	27	15	22	103
Q	26	22	0	0	48
R	13	15	0	0	28
S	3	3	0	0	6
Total Employees (Formal/ <i>Pato</i> , Male/Female)	788	791	106	184	1,869
%	42.2%	42.3%	5.7%	9.8%	100%
Total Employees (Formal/ <i>Pato</i> )	1,579		290		1,869
%	84.5%		15.5%		100%

\*Including both disguised and genuine *pato* employees.

These figures demonstrate that the majority of the labour force in this sector were women, and in particular, the proportion of women in part-time/*pato* employment was higher than that in full-time/formal employment. In Britain, as Table 4-1a shows, all the establishments utilised regular part-time employees. Of these, in two hotels all regular part-time workers were women, in 11 hotels, there were more women than men part-timers, and in one the same number of men and women were employed as part-timers. On the other hand, in Japan, Table 4-1b shows that 16 out

of 19 establishments used “regular” *pato* employees. Of these, in three establishments all *pato* workers were women, in eight there were more women than men as *pato*, in two there were the same number of men and women *pato* workers, and in the remaining three there were more men than women as *pato* employees. Three establishments did not use regular *pato* employees, but employed “casual” *pato* employees during the high season and two of these establishments contracted out to specialist agents substantial parts of jobs within the hotels, including the cleaning of individual rooms, the preparation of beds, and the maintenance of public spaces. These figures show that, while women were certainly the major source of regular part-time/*pato* employees, men were employed on a part-time/*pato* basis as well even though the managers often talked about part-time/*pato* employment as women’s work. The managers often suggested that these men who worked part-time were exceptional because this was their second job (mainly in Britain) and/or they were younger or older men (mainly in Japan).

As discussed in Chapter 3, in Britain, employees are categorised into either full-time or part-time employees according to their working hours while there are some difficulties in doing so in Japan. In all establishments except one in Shirahama, employees were divided into either (*sei-*)*shain* - (formal-)employees or *pato* employees. In some establishments, the latter included both genuine and disguised *pato* employees, demonstrating that working hours were not the crucial determinant for this categorisation of employees.

In one large establishment in Shirahama employees were divided into three categories: (*sei-*)*shain* - (formal-) employees, *jun-shain* - junior employees; and *pato* employees. *Jun-shain* were considered as a type of “semi-formal” employees and differentiated from formal as well as *pato* employees. They worked on a regular full-time basis, performing the same jobs as their formal counterparts. When the manager was asked by the author to explain why these workers were distinguished from formal employees, he attributed this solely to the different forms of “employment contracts” given by the company to these employees. In this contract, *jun-shain* were given different terms of payment from formal and *pato* employees. The wages of *jun-shain* were calculated on a daily basis while formal employees were paid on a monthly salary basis and *pato* employees on a hourly basis. They were paid better than *pato* employees but were not given any other monetary benefits, such as sick pay and guaranteed payment, which were given to formal employees. The manager in this hotel placed these *jun-shain* in the category of formal employees in the questionnaire which did not provide such a category as *jun-shain*.

The question that remains is why some were given *jun-shain* contracts and others formal employee contracts. Although the manager did not give a direct answer to this question, he mentioned later separately that new graduates from universities and local high schools were recruited as formal employees and no new graduates were offered *jun-shain* contract. This suggests that the *jun-shain* contract was for those who were not new graduates, that is for those who had changed jobs or had been outside the labour market. In one sense, *jun-shain* shared similar

characteristics with disguised *pato* employees in other establishments since both worked on a regular full-time basis, usually performing the same jobs as formal employees, but were treated less favourably than their formal counterparts. However, while *jun-shain* were differentiated from, and treated more favourably than, *pato* employees, disguised *pato* were treated as *pato* employees.

The category of casual employees needs to be clarified further. In the British hotels surveyed, this category of employees had various working patterns, such as those who were brought in only for so-called functions, typically conferences and parties; those who came to work only when hotels requested; and seasonal workers during busy summer months. On the other hand, in Shirahama, casual employees tended to be a more homogeneous group of seasonal workers who were hired in the busiest summer season for limited short periods. All establishments surveyed in Shirahama utilised seasonal workers except two of the smaller establishments. Casual workers were employed both on a full-time and part-time basis.

Most hotels in Britain and Japan were not able to provide the exact number and sex of these casual employees. However, the managers said that many casual full-time workers were students who came to work during summer holidays. In Britain, they were both overseas (mainly European) and domestic students while in Japan they were those from big cities, such as Osaka and Tokyo. On the other hand, casual part-time workers were said to be women who were recruited locally. Some managers in Britain referred to “a pool of casual (part-time) workers” on whom they could rely as extra hands at short notice for big events and times of high

booking. These workers were mainly local women. In Shirahama, some managers mentioned specific difficulties in recruiting casual workers locally in summer. One manager particularly mentioned the difficulties in recruiting local women as casual *pato* workers during the high season because of the high demand for these women's labour in every hotel.

The present study focuses upon the regular category of part-time/*pato* employees since the legal position of these employees is of the most relevance to the discussion in Chapters 5 and 6 of this study. It is, however, important to recognise that issues surrounding part-time employment are also entangled with those relating to casual work (Hurstfield, 1987:12-13; see Chapter 6 concerning fixed-term contracts for *pato* employees in Japan). Most importantly for this study, the perception of casual workers influences and permeates the general construction of part-time employment and the employees in it at the workplace. There was a tendency amongst the managers interviewed to envisage part-time employees on a casual basis if they were asked generally about part-time workers without referring to specific examples in their establishments. This tendency contributes to the production of a discourse in which part-time/*pato* employees are constructed as a more unstable workforce than full-time/formal employees even though the evidence shows that this is not the case, as will be discussed in Sections 2 and 3.

### Pay

In Britain, the pay of part-time employees ranged between £2.75 to £4.50 in the establishments studied (although some hotels refused to disclose the information).

The rates of pay differed within an establishment according to the kinds of job performed. Typically, amongst women part-timers, receptionists were paid at the highest rate while housekeepers (called chambermaids in some hotels) and waitresses were most commonly remunerated at the lowest rate. It was often the case that full-time and part-time employees were paid at the same hourly rate if they did the same job. For instance, a manager in a large establishment showed his awareness of the legal requirements for equal treatment of men and women in this area, emphasising that full-time and part-time employees in their hotel were paid on a *pro rata* basis. However, the same manager also told the author that part-time employees could not join the company pension scheme at that time. This shows that employers could save labour costs by treating part-time employees less favourably in terms of access to various fringe benefits.

Moreover, in Britain, the distribution of jobs plays an important role in differentiating the positions of full-time and part-time employees. For example, the two lowest paid jobs, housekeepers and waitresses, were often given to part-timers while the managerial positions were exclusively filled by full-time employees in all establishments surveyed at that time and many full-timers worked as chefs and receptionists, which were relatively better-paid jobs in hotels. This different distribution of jobs between full-time and part-time employees was explained by the managers as reflecting the different quality of these employees. This argument will be further examined in the next section.



On the other hand, in Japan, while formal employees were paid by monthly salary, *pato* employees were commonly paid on an hourly basis, ranging between ¥650 (£4.06) and ¥1,300 (£8.12) per hour. The pay rates differed across establishments and according to the kinds of jobs within these. The highest paid job was “guest room attendants” (see Sections 3 and 4 of this chapter) while cleaning rooms, washing up and making and putting away futon - foldaway mattresses and quilts - were the lowest paid jobs. Again, these lowest paid jobs were often filled by *pato* employees. Some Japanese managers complained about the rise in hourly wages of *pato* employees which had been caused by a labour shortage during the boom period of the late 1980s and the early 1990s. However, the labour cost saving in utilising *pato* employees became clear particularly in relation to bonuses and social provisions.

All establishments except one in Shirahama answered in the questionnaire that they pay bonuses to their formal employees. In many cases these bonuses were a substantial part of the fixed package of remuneration for formal employees and were set out clearly as one of the agreed terms and conditions of employment, as observed in many Japanese companies. On the other hand, six out of 16 establishments which used *pato* employees, replied that there were no such bonuses for *pato* employees. Others indicated that bonuses were awarded to *pato* employees as well but primarily on an *ad hoc* basis as *sunshi* or *kinippu*, which mean “a little token of gratitude”. This suggests that what *pato* employees received were not the normal bonuses awarded to formal employees and the amount was substantially less generous than that delivered to their formal counterparts.

Moreover, several managers in Shirahama mentioned that there were no social welfare provisions for their *pato* employees at all. The Japanese Ministry of Labour encourages employers to make provision for *pato* employees who work more than certain specific hours per week and earn a certain threshold of wages annually. However, the joining rate of *pato* employees to these social provision schemes is relatively low. Although in some cases *pato* employees also cooperated with the management in order to avoid being required to make contributions to the schemes from their earnings, this is certainly a financial advantage for employers who wish to save labour costs.

This section has described the research method and the overall employment structure in the establishments studied in Britain and Japan, focusing upon the categorisation of employees and pay. Full-time and part-time employees in Britain and formal and *pato* employees in Japan were clearly divided in each establishment and the differentiated treatment of them was observed in the distribution of jobs, pay and/or other benefits. In the next two sections, I examine managers' statements which emphasise various differences based on labour-related and/or gender-related factors in order to legitimise the different treatment of full-time/formal and part-time/*pato* employees.

## **2. The Labour Difference Discourse: Creating the Hierarchy - Quantitative**

### **Differences between Employees**

This section provides a critical examination of managers' statements in which the hierarchy of employees has been created based upon quantitative differences. In both Britain and Japan, quantitative differences (that is the different amounts of input of time between full-time/formal and part-time/*pato* employees in working hours and/or the length of employment) were directly or indirectly highlighted by most of the managers in constructing the different and inferior value of part-time/*pato* workers compared with full-time/formal employees. As will be discussed in the next section, qualitative differences put forward by both British and Japanese managers in such aspects as job content, responsibility and the understanding of business, are often founded upon these quantitative differences. This means that the quantitative and qualitative differences emphasised by the managers are closely related and, reflecting this, some statements made by the managers were of great relevance in both this and the next sections. These statements about quantitative and qualitative differences I identify as the labour difference discourse.

The managers' representation of part-time/*pato* employees as inferior workers based upon quantitative differences can be challenged at two different levels. One is to question whether or not the input of part-time/*pato* employees in terms of time is really less than full-time/formal employees. The other is to demonstrate that, when there is a difference in the amount of input of time, quantitative differences do not

necessarily lead to qualitative differences. This section focuses upon the first of these points while the next section examines the second.

This section first examines quantitative differences in working hours, and then those in the length of employment (or stability) between full-time/formal and part-time/*pato* employees. In the case of Britain, all part-time employees worked shorter hours than full-time employees and on average their working hours were much shorter than those of their Japanese counterparts. So there is a difference in this aspect between full-time and part-time employees in Britain although this quantitative difference does not automatically constitute qualitative differences as will be discussed in the next section. In Japan, on the other hand, it is necessary to examine the assertion of quantitative differences based upon working hours between formal and *pato* employees before questioning qualitative differences. This is because of the widespread use of disguised *pato* employees, who work as long hours as their formal counterparts, and the average working hours of genuine *pato* employees were much longer than those of their British counterparts.

I then move to the examination of the claims made by the interviewees concerning the instability of part-time/*pato* employees in comparison to their full-time/formal counterparts. Some managers pointed to this factor in the processing of constructing discursively the inferior value and worth of part-time/*pato* employees, particularly in relation to skill acquisition. However, the claim was often contradicted by the very same managers, countered by other managers, and thrown into doubt by the evidence collected through the questionnaire. In analysing these, I

will demonstrate that the charge that part-time/*pato* employees are an unstable and, therefore unreliable workforce, is unfounded.

### *Differences in Working Hours*

Amongst the establishments studied in Britain, the weekly working hours of full-time staff varied between 37.5 hours to 42.5 hours, although the majority of establishments (10 out of 14) adopted working hours of 39 hours per week. In the establishments surveyed in Shirahama, fixed contractual working hours for formal employees varied between 40 and 48 hours per week. The majority (11 out of the 19), adopted weekly working hours of 44 while four set 40 hours per week. The Labour Standard Law (LSL) in Japan changed the legal maximum weekly working hours in 1991. The LSL advocates a gradual reduction of working hours to 40 hours per week and has currently set a temporary standard of 44 hours per week in force since April 1991. However, some establishments were exempted from the 44-hour rule, such as small businesses and a wide range of firms in service industry. At the time of the research in Japan, small businesses in the service industry, including hotels, employing less than nine people were permitted to set their fixed weekly working hours up to 48 hours, medium sized establishments between 10 to 300 employees were allowed to set working hours of up to 46 per week while large establishments with over 300 employees needed to comply with the general rule specified in the LSL. All establishments in which interviews were conducted appeared to comply with this legal requirement except one medium-sized establishment which had adopted 48 working hours per week.

In both Britain and Japan, the working hours of part-time/*pato* employees varied considerably to such an extent that, in many cases, the managers were only able to give the average number of working hours. In Britain, part-time women employees worked various hours, ranging from two hours (weekend only) to 30 hours per week. Only one hotel said 30 hours while four said 20 hours (including up to 20 and average 20), two 16 hours and another two 15 hours per week. Some managers were not able to indicate even a rough estimation of the number of hours worked by their part-time/*pato* employees because the working hours of these employees fluctuated to a great extent.

In Shirahama, 16 out of 19 establishments used regular *pato* employees and amongst these 16 establishments, eight stated that the fixed working hours of all *pato* employees were actually shorter than those of their formal counterparts. That is, in these eight establishments, there were no disguised *pato* employees. Of these eight, five replied that the average working hours of their *pato* employees were approximately 30 hours; two answered 33 hours on average; and one between 20 and 30 hours per week.

Amongst the other eight establishments, three replied that the fixed working hours of all regular *pato* employees were the same as those of formal employees, suggesting that all *pato* employees there were disguised *pato* employees. In the remaining five establishments, there were both genuine and disguised *pato* employees; two said between 38 and 44 hours per week; one between 24 and 44; one between 18 and 44; and one between 18 and 40. Nevertheless, this means that

eight out of 19 establishments surveyed in Shirahama used disguised *pato* employees.

Despite this widespread use of disguised *pato* employees and the relatively longer working hours worked by them, the Japanese managers often referred to the shorter working hours of *pato* employees, alongside their qualitative differences as will be discussed in the next section, when they were asked in general by the author about the disadvantages of using *pato* labour. One manager emphasised the disadvantages of utilising *pato* employees as follows:

(The problem of utilising *pato* employees is) the inconsistency of work because they are at work for a shorter time than formal employees. I mean, *it is difficult to give them a complete set of tasks as they come and go* (Emphasis added).

This statement suggests that shorter working hours prevent *pato* employees from performing “a complete set of tasks” and all they can do is piecemeal work.

Another manager stated that

We have to provide jobs which are suitable for *pato* employees, such as washing up and making and putting away *futon* (fold-away mattresses and quilts). Something simple they can do when they are here for a short time.

As shown in these comments, the managers envisaged what *pato* employees were able to do was severely limited by their shorter working hours. This point will be further discussed in the next section in relation to differences in job content. However, here I wish to focus upon the fact that working hours of *pato* employees, which were described by the managers as being only long enough to perform

piecemeal work, ranged between 18 and 44 hours, and most typically around 30 hours per week. It is doubtful that the manager could not “give them a complete set of tasks” or only such jobs as “washing up and making and putting away *futon*” within this rather long span of working hours.

Although it is difficult to arrive at a definitive picture of the average working hours of part-time/*pato* employees in general in each country, the aforementioned figures suggest that *pato* employees in Shirahama worked longer hours and more days than their counterparts in and around Stratford-upon-Avon. This also confirms the picture gained from official statistics presented in Chapter 3 which shows that one of the characteristics of *pato* employment in Japan is the longer working hours of the employees in this pattern of employment in comparison to their counterparts in Britain. Yet, as demonstrated above, despite long working hours, *pato* employees in the establishments studied in Shirahama were not seen in any more positive light by the managers there than in Britain

However, a manager of one of the three establishments where all *pato* employees were disguised *pato* employees admitted that there was no difference between them and their formal counterparts except the differentiated working conditions set by the management itself. In this particular hotel, all these disguised *pato* employees were women and, according to the manager, mainly middle-aged housewives. The relevant part of the interview with this manager was as follows.

*Author:* You said that the fixed working hours of all regular *pato* employees in your hotel are 44 hours per week, which is the same as formal employees.



If they work the same hours, what is the difference between them and formal employees?

*Manager:* *Pato* do not have bonuses, they are not covered by the national health insurance for employees unlike formal employees.

*Author:* Do they do the same job as formal employees ?

*Manager:* Yes. The work they do is the same. How could it be different !

This suggests that the distinction between formal and *pato* employees has been created purely by the employer as a contractual distinction for the sake of differentiating employees even though there is no practical difference at all between them in terms of the number of hours and the work they perform. This demonstrates that it was the employer offering the formal employment contract to one group and the *pato* employment contract to the other group of workers, which imposes the less favourable terms and conditions of employment on the latter, the majority of whom were mainly middle-aged housewives.

This is a typical case of disguised *pato* employees who should, according to the recommendation of the Ministry of Labour, be treated equally to formal employees. The differentiated treatment of these employees at the workplace is a specific problem in Japan and indicates discrimination. In particular, it cannot be claimed that disguised *pato* employees “choose” to be in this position where they are treated in a more disadvantaged way despite the fact that they work the same hours and perform the same tasks as their formal counterparts. Here the question of discrimination is raised strongly in two ways because there is a significantly different

treatment between the two categories of formal and disguised *pato* employees. One is a question of discrimination based on differentiated contractual employment status imposed by employers and the other is a question of sexual discrimination since women are more likely than men to be in the category of disguised *pato* employees.

As will be discussed in Chapter 6, the Japanese Ministry of Labour recommends employers to treat disguised *pato* equally to formal employees, but this is not legally binding. Clearly employers can ignore this kind of administrative recommendation which does not entail any measures of enforcement. Moreover, although the law in Japan prohibits sex discrimination in regard to pay (Art.3 in LSL), it permits employers to provide different terms and conditions of employment according to the employment status of workers. This is based on the view that employment contracts are the product of negotiation between employers and employees, originating from the principle of freedom of contract which is equally guaranteed to both employers and employees. This means that the less favourable treatment of disguised *pato* employees is legal as long as it is constructed as employers exercising management discretion based on their differentiated contractual employment status.

Nevertheless, it is more difficult for employers to justify the less favourable treatment of disguised, as distinct from genuine, *pato* employees without invoking the sense of discrimination since there are no material differences such as shorter working hours between them and formal employees. This is why employers, despite

the realities, have to exclude disguised *pato* employees from their discursive construction of *pato* employment in which the shorter working hours of *pato* employees are emphasised as one of the main factors rendering *pato* inferior to formal employment. Employers may argue that this is because the majority of *pato* employees are genuine *pato* employees who actually work shorter hours than their formal counterparts and it is, therefore, logical to construct *pato* employment based on this category of employees. As will be discussed in Chapter 6, this is the argument put forward by a leading member of the Study Group of Part-time Employment appointed by the Diet (Japanese Parliament) to justify the exclusion of disguised *pato* employees from the scope of the Law on Part-time Employees (PEL) 1993. However, I would argue that the exclusion of disguised *pato* employees in both the managerial and legal construction of *pato* employment in Japan is a necessary exercise to obscure the gender-based distinction between employees.

It is prohibited by the law to discriminate against employees based on their sex, but *pato* can be treated less favourably by differentiating it from formal employment and constructing *pato* as inferior to formal employment on the basis of differences in labour-related factors. This is legal since the law does not prohibit such differentiation of employees. Here the construction of the inferiority of *pato* employment on labour-related grounds is crucial, particularly in legal terms. Otherwise, treating *pato* employees less favourably than those in formal employment cannot be justifiable. Disguised *pato* employees are an obstacle in constructing the inferiority of *pato* on the grounds of a material difference because

there are no clear differences between them and formal employees, the latter being treated as the norm and the most privileged employees in the Japanese labour market, the majority of whom are men. What the less favourable treatment of disguised *pato* women employees exposes is that the differentiation of *pato* employees is in reality a gender-based differentiation imposed by employers, supported by the law, in the form of an employment contract and that it, therefore, does not really matter whether these women work as long as (or shorter than) their male formal counterparts. Every time employers refer to the shorter working hours of *pato* employees to justify their treating them less favourably than formal employees, they obscure the existence of *pato* employees who are treated less favourably despite their full-time working hours and the gender-based differentiation between formal and *pato* employees.

In Britain, part-time employees work from two hours to 30 hours per week. It may be true that a person working for two hours can only do short tasks or fragmented work, but there is no reason why someone working 30 hours cannot do the same work as full-timers. So the argument that the work performed by part-timers is intrinsically less valuable because of their fewer working hours is seriously questionable. On the other hand, in Japan, many *pato* employees do not work shorter hours, so the basis for the argument which attributes the inferiority of *pato* employees to their working hours is unfounded. Moreover, the analysis of Japanese managers' arguments demonstrates the power of discourse which operates in the omission of disguised *pato* employees from the general construction of *pato* employees, concealing the fact that some *pato* employees are treated as *pato*

irrespective of their working hours which are often as long as their formal counterparts.

### *Differences in Stability*

The second factor, which was put forward by some managers to differentiate part-time/*pato* from full-time/formal employees in both Britain and Japan, was the instability of the former group of employees in comparison to the latter. This view, however, has to be examined carefully as often the managers appeared to be talking about a given general image of part-time/*pato* employees rather than their own concrete experience with regular part-time/*pato* employees in their own establishments. The alleged instability of part-time/*pato* employees implies that part-time/*pato* employees are less committed and are less reliable workers than full-time/formal employees.

In the questionnaire distributed to the managers, one question was designed to see how they perceived the mobility of each category of employees: "do you think that regular staff in the following categories are more or less likely to leave the company after only a short period of employment?" To answer this question, the British managers were required to select either more or less for each of the following three categories of staff: regular full-time managerial; regular full-time non-managerial; and regular part-time non-managerial staff. (See Appendix, question number 2-3. It should be noted that there were no regular part-time managerial staff in any establishments surveyed so that this category is excluded from the discussion here).

Table 4-2a shows the results of the response to the question in the questionnaire in Britain. While all hotels selected managerial staff as less likely to leave the establishment, six hotels answered that full-time non-managerial staff were more likely to leave the establishment. On the other hand, out of 14 hotels, 10 hotels answered that part-time non-managerial staff were more likely to leave the company after a short period of service. When the author asked the managers about how short a period this was, the span ranged from a few days to less than one year. One other hotel manager said that he could not give a precise answer since some regular part-time non-managerial staff stayed for a long time but others did not. The remaining three hotels replied that part-time non-managerial staff were less likely to leave the company after a short period of service. This demonstrates that the majority of the managers in Britain considered that part-time employees were a less stable workforce than their full-time counterparts. In support of this view, one British manager stated that

Chances are they [full-time workers] have been with us for a while. There is loyalty there. We can walk away and they can carry on. I would always prefer to have full-time workers.

This comment shows that the stability of full-time employees is seen as a reflection of loyalty which, according to this manager, part-time employees hardly possess.

In some cases, the views of the managers were highly questionable and contradicted by other evidence. For example, one British manager responded in the questionnaire that part-time non-managerial staff were more likely to leave the company after only a short period employment. Yet, in the interview when the same manager was asked

Table 4-2a: The Results of the Questionnaire amongst 14 Hotels in Britain

Question 2-3

Do you think that regular staff in the following categories are more or less likely to leave the company after only a short period of employment ?

	less	more	cannot tell	Total
Managerial staff	14	0	-	14
Full-time non-managerial staff	8	6	-	14
Part-time non-managerial staff	3	10	1	14

\* The category of ‘cannot tell’ means that there is one manager who did not give a decisive answer of less or more about part-timers because he thought that it depended upon individual employees.

by the author specifically about his part-time women workers, he stated that:

They [part-time women workers] have been working on a part-time basis *for years*. The same people. So we have great *loyalty* from staff (Emphases added).

The manager implied that this was somewhat unusual. However, another British manager contested the view that part-time employees are more unstable, by pointing out that many part-time employees in his hotel were women with families who lived locally and were less likely to move away from the area and, therefore, less likely to change their job. Although the majority of managers thought part-timers were less stable, they were not unanimous, and a significant number thought full-time staff were also unstable.

In Shirahama, there were also discrepancies between the answers given in the questionnaire by the managers and statements made in interviews. In the interviews, the managers often emphasised the instability of *pato* employees in comparison to

formal employees. For example, one manager who emphasised the instability of *pato* employees in the interview, had answered in the questionnaire that both formal and *pato* non-managerial employees were less likely to leave the hotel after only a short period of employment. In this particular hotel, all *pato* employees were women. When this apparent inconsistency was pointed out by the author, the manager stated that:

Well, I didn't mean that they [*pato* employees] actually move from this hotel to another. But we feel anxious about the possibility.

This is a particularly good example of the circular reinforcement of the discourse surrounding *pato* employees. Another manager also underlined the potential instability of *pato* employees because of the job situation in Shirahama particularly during the summer months when all the hotels were competing to secure additional workers. The third manager blamed a business boom in the late 1980s and the early 1990s for the instability of *pato* employees who have learned, according to the manager, to change employers very easily.

On the other hand, the results collected through the questionnaire are as follows (shown in Table 4-2b). All establishments replied that managerial staff were less likely to leave. Nine out of 19 establishments responded that formal non-managerial staff were more likely to leave while eight hotels out of 16 establishments which utilised *pato* workers, selected this for *pato* non-managerial staff. This shows that the managers in Shirahama were almost equally divided concerning the stability of formal and *pato* non-managerial staff. This may appear a surprising result since the image of formal employment in Japan is based on the assumption of "life-time



Table 4-2b: The Results of the Questionnaire amongst 19 Hotels in Japan

Question 2-3

Do you think that regular staff in the following categories are more or less likely to leave the company after only a short period of employment ?

	less	more	N/A	Total
Managerial staff	19	0	-	19
Formal non-managerial staff	9	10	-	19
<i>Pato</i> non-managerial staff	8	8	3	19

\* The category of N/A means that there were three hotels which did not employ regular *pato* employees.

employment”. However, as many commentators point out, this practice operates mainly amongst male workers who are employed in large firms (see Chapter 3). It may be said, therefore, that this result is a better reflection of the working lives of employees in medium and small sized companies since many establishments surveyed are in this category.

Moreover, two establishments replied that formal non-managerial employees were more likely to move while they selected less for *pato* staff. In these two establishments, women occupied the majority of the workforce in both formal and *pato* work. When the manager of one of these two hotels was asked by author why this was the case, he responded that:

Some of these workers [formal non-managerial employees] are young women. They tend to leave the company when they marry. But *pato* employees are quite stable.

This statement suggests that, while unmarried young formal women employees may be seen as unstable, older married women may be seen as stable. This supports a view which is contrary to some managers' claim about *pato* employees as being unstable, since 82.0 per cent of *pato* women employees are married women (ML, PPRD, 1991:94).

Although there were inconsistent views of the instability of *pato* employees amongst the managers in Shirahama, some managers referred explicitly to the instability of *pato* employees in a way that undermines the value of these employees. In addition, there are some scholars who attribute lower pay amongst women and *pato* employees to their shorter period of service, insisting that this causes the lower level of skill development amongst *pato* employees in comparison to that of formal employees. In this view, the differential in pay between formal and *pato* employees is not discrimination but an objective factor based on skill (see Koike, 1983:11-115). However, judging from the lack of consensus amongst the managers, and the inconsistencies in the arguments of these who claim *pato* employees are more unstable, it is not at all clear that *pato* employees are a more unstable workforce than their formal non-managerial counterparts.

In both Britain and Japan, although more so in the former than the latter, the managers referred to the instability of part-time/*pato* employees as a factor accounting for their inferiority. However, as discussed below, while employers highlight the "instability" of part-time/*pato* employees, they are more likely to make part-time/*pato* employees redundant before full-time/formal employees in order to

adjust the labour force according to business fluctuation. This means that part-time/*pato* employees may be better conceptualised as more “insecure”, rather than “unstable”, than their full-time/formal counterparts. Many British managers were not as clear as their Japanese counterparts when they were asked whether or not they shed part-time employees first when business demand declined. Some said only that they requested part-time employees to work reduced hours or not to come in for a while and others avoided giving a straight answer, for example by saying that they were more interested in reducing the number of managers than the number of manual workers. Nevertheless, as discussed in Chapter 5, various legal cases show that making part-timers redundant before full-timers has been a widespread practice in Britain, although it may amount to sexual discrimination under the current legislation.

On the other hand, the majority of managers in Shirahama stated that they reduced the hours of *pato* workers or stopped using them, alongside other methods such as the reduction of bonuses for formal employees and through natural wastage, before considering redundancy of any formal employees. They were anxious to stress that they never dismissed formal employees even if it was at the expense of *pato* and temporary workers. One manager in a hotel where the majority of *pato* workers were women, stated:

We never make our [formal] employees redundant even when business is suffering. When things are very difficult, we *shed pato workers first* (Emphasis added).

When asked by the author whether they have made formal employees redundant recently, another manager answered:

No. We have never made formal employees redundant. We always attempt to adjust our workforce through natural wastage. We just have to leave vacancies unfilled when the business is not doing well. Or we have to let *pato* go.

These are typical answers which the author received in the interviews with managers, demonstrating that the managers considered that shedding *pato* workers first was a reasonable and acceptable step to take. At the same time, many managers in Shirahama emphasised the difficulty of shedding formal employees and that this was considered as the last resort. Only one hotel manager said that he had made formal employees redundant recently following restructuring and the closure of one of the hotel activities. However, he was particularly keen to emphasise that the process of dismissal had involved a lengthy consultation and a careful selection of workers. He stated:

It is a very painful thing to make workers redundant. I am in charge of making the decision about who should go. But I tried to do everything I could to help these workers. We first approached older workers to take early retirement, explained to others what was going on and spent hours consulting them.

Another manager also pointed out the strict control in dismissing formal employees by the local Labour Standard Office. The Labour Standard Office is a legal

institution which has the power to investigate complaints made by employees against employers. These remarks clearly show the unacceptability of dismissing formal employees under the expectation of long-term stable employment in Japan, reinforced by the Labour Standard Office and courts (see Chapter 6).

On the other hand, the management clearly needs to adjust its labour force according to the fluctuation of business and the utilisation of *pato* employees can be an obvious solution to this in Japan. When the managers in Shirahama were questioned about the managerial advantage in using *pato* employees, almost all referred to the relative ease in carrying out “*koyochosei* - employment adjustment”. This includes reducing the number of working hours of *pato* employees as well as the number of *pato* employees through redundancy during recessions in this sector.

#### The Nikkeiren - the Japan Federation of Employers' Associations

The practice of making *pato* redundant before formal employees is also supported by the Nikkeiren, the Japan Federation of Employers' Associations, which is one of the most influential employers' Organizations. The author conducted an interview with the manager in the personnel management division of this organisation in Summer 1994. In this division, issues related to personnel management were said to be dealt with from the viewpoint of business, the stability of the economy, and the welfare of employees. Although the Nikkeiren, according to the manager, had not formed a direct policy on *pato* employment, the general view about it can be analysed as the opposite of that towards formal employment. The manager emphasised that the Nikkeiren has a strong view concerning the redundancy of

formal employees, which should be the very last resort for employers in Japan to turn to.

Japan has experienced an recession unprecedented in terms of its length and the downsizing of the economy since the end of 1991. The interview was conducted at the time of this recession and it was clearly observed that the most pressing issue for the Nikkeiren at that time was “*Koyochousei* - employment adjustment”. Prior to considering the redundancy of formal employees, the Nikkeiren encourages employers first to take such measures as the reduction of overtime work; the restriction of pay increases; the reduction of salaries and bonuses of those in managerial positions; and the drastic reduction of salaries and bonuses of executives.

In the second stage when companies have to reduce the actual number of employees, the Nikkeiren produced a long list of measures which should be taken before the redundancy of formal employees (Matsui, H., 1993). These are: the reduction or suspension of new recruits; the termination of contracts with dispatched workers (so-called “temps”); the transfer of workers to other more active departments or to affiliate or subsidiary companies; *the termination of the contract with, and the redundancy of, temporary and part workers*; the encouragement of earlier retirement on better terms; the suspension of extended retirement; putting employees on temporary leave from service (in this system, employees on temporary leave are usually still on the pay-roll of the company and are paid a salary by the company although usually at much reduced rate); and the

call for voluntary redundancy. The Nikkeiren, as well as employers in Shirahama, emphasised the unacceptability of companies making formal employees redundant although it admitted that the current economic stagnation was so serious that it might alter some aspects of life-time employment practice in Japan. I would argue, therefore, that the insecurity of *pato* employees as a result of employers' redundancy policies is, at least, as important as employees voluntarily quitting their jobs, in accounting for any shorter length of service there may be compared with formal employees.

This section has examined quantitative differences between full-time/formal and part-time/*pato* employees in terms of working hours and the length of service. There are indeed differences in the number of working hours between full-time and part-time employees in Britain and that between formal and genuine *pato* employees in Japan. However, there were no differences between disguised *pato* employees and their formal counterparts in this respect, and disguised *pato* employees were widely utilised in establishments surveyed in Shirahama. The existence and working conditions of this group of *pato* employees questions Japanese managers' general construction of the inferior value of *pato* employees on the basis of their fewer working hours. This illuminates the fact that the managers constructed discursively *pato* employment by excluding disguised *pato* employees in order to create the hierarchy of employees based upon differences in working hours between formal and *pato* employees. Although there were real differences in working hours for full-time and part-time employees in Britain, in some cases the difference in hours was not great and certainly not enough to claim that part-timers could not do the same

kind of work as full-timers. It is not clear where the dividing line might be, but what this suggests is that part-time employees cannot be seen as inferior as a group on the grounds that they can only do short span or piecemeal work.

Moreover, there were some employers who argued that part-time/*pato* employees were less stable and, therefore, inferior to full-time/formal employees in both Britain and Japan. However, this claim is also highly questionable since little consistency was observed between the managers in the questionnaire and interviews and inconsistencies were seen in the arguments of those managers who thought part-time/*pato* employees were less stable. Moreover, the insecurity of part-time/*pato* employees as a result of downsizing policies appear at least as important as their instability. I therefore argue that managerial claims that part-time/*pato* employees are inferior to full-time/formal employees and are less valuable to the business on the grounds of their quantitative differences in the form of shorter working hours and shorter length of service, should be recognised as part of a discourse which I term the labour difference discourse, rather than accepted as fair evaluation of the worth of part-time/*pato* employees.

Having critically examined quantitative differences which are a vital part of the labour difference discourse, I next move on to the analysis of qualitative differences, another crucial composition of the labour difference discourse, particularly focusing upon the close connection of qualitative and quantitative differences in managers' arguments.



### **3. The Labour Difference Discourse: Creating the Hierarchy - Qualitative**

#### **Differences between Employees**

In this section, I examine another aspect of the labour difference discourse, focusing upon managers' statements which highlighted qualitative differences between full-time/formal and part-time/*pato* employees and the inferior quality of the latter. Most managers were eager to emphasise that the difference between full-time/formal and part-time/*pato* employees lies not only in quantitative differences such as the number of hours, but also in qualitative differences. I analyse these arguments in terms of the following three aspects. One is differences in job content, based upon the allocation of simpler tasks to part-time/*pato* employees; second is differences in the element of responsibility, based upon the lesser responsibility given to part-time/*pato* employees; and third is differences in the degree of commitment, based upon the lesser commitment of part-time/*pato* employees to the work compared with full-time/formal employees. In particular, in the last group of arguments, the labour difference discourse and the gender difference discourse cut across each other, clearly showing the close interlinkage of the two discourses.

#### ***Differences in Job Content***

Managers' claims of differences in job content can be considered as a matter of job distribution, that is what the two groups of employees do is different. Many managers stated that while full-time/formal employees carried out more complex and skilled jobs, part-time/*pato* employees were allocated simpler and more

repetitive jobs. When the managers were questioned about the kinds of jobs part-time/*pato* employees performed in their establishments, the majority of them cited such tasks as cleaning rooms, washing up, serving meals in restaurants, and making and putting away *futon*. These are essential but considered as repetitive and unskilled tasks within hotels.

For example, one British manager stated that:

Many part-timers do housekeeping jobs. Actually, housekeeping has been always done mainly by part-timers. There are many part-time waiters and waitresses, too.

Another British manager also said that many part-timers were used in these jobs and he described these tasks as “lower(-skilled) and simpler jobs”. In Japan, one manager answered as follows when questioned by the author about tasks which were performed by *pato* employees.

Cleaning, washing up, making and putting away *futon* ..... Those which are *simple* and *repetitive* ..... We use *pato* employees *only* for these jobs (Emphases added).

By using the word “only”, the manager implied that *pato* employees cannot carry out more complex tasks, linking this with the shorter working hours of *pato* employees. Another Japanese manager stated that they had to “provide jobs which are suitable for *pato* employees”, that is simple and unskilled jobs, because their shorter working hours prevent them from performing more complex tasks (for the full quotation see Section 2).

These comments show that many part-time/*pato* employees performed tasks which were considered by managers as repetitive and unskilled, but also suggest that skilled work cannot be organised on a part-time/*pato* basis. What is suggested here is that work of lower quantity in terms of hours, must be also work of lower quality in terms of job content. However, the above statements were made mainly when the managers were asked generally about what part-time/*pato* employees did in their establishments. When the managers talked about specific examples of their part-time/*pato* employees, a very different picture emerged. In most establishments, part-time/*pato* employees were utilised in a much wider range of jobs and the general description of *pato* employees' jobs given by the managers as simpler and lower skilled did not appear accurate. For example, in Britain there were many part-time receptionists and in Shirahama there were many *pato* "guest room attendants" both of whose jobs, as described by the managers, demand considerable skills and were commonly paid at a higher hourly rate than part-time/*pato* employees in other types of jobs.

In Britain, several managers told the author that they considered that receptionists were amongst the most skilled workers in their establishments. Reflecting this, their quoted hourly wages were higher than some other employees. For example, in one British hotel, the manager stated that receptionists were paid £4.30 an hour while chambermaids received £3.50. In Japan, "guest room attendants" were similarly considered by the managers as one of the most skilled jobs. They are not housekeepers or chambermaids as in Britain but those who provide personal services for the guests in certain rooms which are allocated to be under their

responsibility, including the initial guiding of guests to the room, and serving tea and dinner in individual rooms. This function is of particular importance for traditional Japanese inns which serve dinner for their guests in their own rooms. Although guest room attendants were not required in westernised hotels which do not offer this service, all establishments covered in the fieldwork in Shirahama, except one, maintained the service and all managers who talked about this job considered that guest room attendants were highly-skilled women's jobs. Here I should like to concentrate on the aspect of skill in this job since its gender-specificity will be discussed in the next section.

While guest room attendants are considered by the managers as highly-skilled workers, many were employed on a *pato* basis. When employed on this basis, however, guest room attendants were treated more favourably in terms of pay than *pato* employees who performed other types of jobs. They received wages at a much higher rate, often calculated on a different basis from other *pato* employees. In some hotels, the remuneration of *pato* guest room attendants was calculated on a daily basis unlike other *pato* employees who were usually paid hourly. One manager quoted a wage of ¥11,000 (£70.97) per day for their *pato* guest room attendants who came to work typically two days a week while *pato* workers who engaged in other types of jobs in the same hotel received ¥800 (£5.16) per hour. In other establishments, both *pato* guest room attendants and *pato* employees were paid on an hourly rate, but a large difference in pay was commonly observed between guest room attendants and other *pato* employees. For example, one hotel paid an hourly calculated wage for all *pato* employees, but guest room attendants were paid by the

hourly rate of ¥1,100 (£7.10) while most other *pato* employees received ¥850 (£5.48). This shows the privileged position of guest room attendants as skilled employees.

I should like to place particular emphasis on the fact that there were many part-time receptionists and *pato* guest room attendants in spite of managers' insistence that part-time/*pato* employees were those who perform simple jobs. The managers constructed the difference and inferiority of part-time/*pato* employees by pointing to differences in job content between them and their full-time/formal counterparts. The utilisation of part-time/*pato* employees as receptionists and guest room attendants is clearly inconsistent with what was argued by the managers since these are highly skilled jobs. This demonstrates that part-time/*pato* employees can perform skilled jobs and it is possible to organise skilled jobs on a part-time/*pato* basis.

Moreover, although a large number of part-time/*pato* employees were indeed employed on lower-graded tasks, such as cleaning rooms and making *futon*, this is often because of business needs, rather than the impossibility of organising skilled work on a part-time/*pato* basis as the managers asserted. While some managers gave the impression that it was the difference of part-time/*pato* employees that determined the allocation of lower-skilled jobs to them, others stated that some tasks require a part-time labour force. One Japanese manager stated that:

*We need pato employees for cleaning rooms, and making and putting away futon. We cannot employ full-time workers for these tasks which require a lot of manpower at the same time (Emphases added).*

Another Japanese manager also stated that:

It has to be *pato* employees who clean guest rooms, or make and put away *futon*, if you think about these tasks which have to be done within a short space of time.

The same applies to the situation of British hotels especially in relation to the tasks carried out by housekeepers or chambermaids and waiters or waitresses. The above comments demonstrate the necessity of deploying extra labour in particular types of jobs at a specific time in hotels, which are more cost-effectively carried out by part-time labour than full-time labour. In addition, a British manager stated that

Although many people wish to work in our hotel, it is difficult to find housekeepers because of the nature of the job ..... not so attractive, cleaning rooms, I guess.

Several other British managers also expressed difficulty in recruiting workers for this unpopular job. The unpopularity of this particular job can be explained not only by its repetitive nature but also by its lower pay and grade.

I argue, therefore, that managers' claim that part-time/*pato* employment is inferior on the grounds that only unskilled, repetitive, simple work can be organised on a part-time/*pato* basis, must be seen as part of the labour difference discourse, whereas the reality is that a number of skilled jobs are in practice organised on a part-time/*pato* basis in the establishments surveyed. This conclusion is also supported by the fact that the organisation of part-time/*pato* work in the hotels has as much to do with the needs of the business and/or large amounts of labour in a

concentrated period of time as it has to do with the intrinsic nature of part-time/*pato* work or part-time/*pato* workers.

### *Differences in Responsibility*

Even where full-time/formal and part-time/*pato* employees were engaged in the same jobs, many managers still insisted that there were differences between these two categories of workers because of levels of responsibility of their jobs. Many managers were, however, unable to explain to the author in concrete terms what kind of extra functions full-time/formal employees had to fulfil because of their heavier responsibility. Furthermore, some managers suggested that part-time/*pato* employees cannot bear as much responsibility as their full-time/formal counterparts because they possessed a poorer knowledge of business, showing their clear perception of part-time/*pato* employees as inferior workers.

When asked about the difference between full-time and part-time employees, one British manager told the author that:

It's not just a matter of hours. Because generally the part-time staff know *they don't have responsibility*. They tend to be junior staff anyway. *And because they are not here all the time, they don't understand as much about business necessarily*. So generally they are shown what to do constantly, and, therefore, there is a feeling they are more junior (Emphasis added).

This statement shows that part-time employees were differentiated from full-time employees by the managers on the grounds that they did not have responsibility because of their lack of business knowledge, in contrast to full-time employees. In particular, while the manager above emphasised these qualitative differences between full-time and part-time employees, he also linked these factors to the shorter working hours of part-timers. In this manager's view, the shorter working hours of part-time employees are the cause of their poorer knowledge of business, and for that reason, they were given less responsible jobs. What this means is that according to the managers, work of lower quantity in terms of hours must be associated with work of lower quality in terms of business knowledge and responsibility.

Furthermore, this manager linked the poorer knowledge of business he perceived amongst part-time employees with their junior status. Certainly in this particular hotel, no part-time employees were in managerial and supervisory positions. On the other hand, he mentioned later that there were several part-time women employees who had worked for the hotel for a long time as receptionists and he praised the quality of work performed by these employees. It is difficult to believe that these employees, though they were part-time employees, had to be "shown what to do constantly".

In Japan, when asked about the disadvantages of utilising *pato* employees, one manager stated that



The problem is the resentment amongst formal employees toward them [pato employees] since they only come to work *a few hours a day*, often do not have a clue what is going on here, and take back quite good wages. Mind you, they do not need to be attentive to work since *they do not have responsibility* (Emphasis added).

Here again, the poorer knowledge of business was identified by the managers and differences between formal and *pato* employees were highlighted based on this understanding of business and the level of responsibility, coupled with the shorter working hours of *pato* employees. However, as discussed earlier, the number of working hours of *pato* employees was not something like “a few hours a day”. Indeed, in this particular hotel, the manager told the author the working hours of *pato* employees ranged from 20 hours to 40 hours per week. This shows that managers’ representations of *pato* employees did not reflect the actual structure of *pato* employment in Organizations, and that managers’ statements about *pato* workers’ lack of responsibility should be questioned.

### *Differences in Commitment*

As discussed above, part-time/*pato* employees were utilised in a wide range of jobs and often performed the same tasks as full-time/formal employees. Even in such cases, many managers asserted that part-time/*pato* employees were generally different from, and less valuable than, their full-time/formal counterparts not only because they were given less responsibility and possessed less understanding of business but also because of their lower commitment to the work. Again as will be

shown below, the commitment of employees to the work is firmly tied to the argument of quantitative differences, that is the shorter working hours and/or the instability of part-time/*pato* employees, which were seen by the managers in both Britain and Japan as indicators of their being less committed workers.

One British manager told the author about the disadvantages of utilising part-time employees as follows.

They [full-time employees] *understand the business* . . . . . I don't think part-timers would have quite the same level of *commitment*. (Emphasis added).

In this comment, full-time employees are elevated as superior workers on the grounds of their better knowledge of business and the higher level of commitment.

The view of part-time/*pato* employees as less committed workers was most clearly expressed by the managers in relation to the possibility of creating managerial positions on a part-time/*pato* basis. As mentioned earlier, there were no part-time staff in managerial positions either in Britain or Japan. Although one British manager mentioned that there had been such a position in the past in his establishment, it, according to him, "did not work out". The great majority of managers in both countries dismissed the feasibility of managerial positions filled by part-time/*pato* employees, strongly emphasising the importance of the high level of commitment required to be managers. When asked whether managerial positions would be created on a part-time basis in the future, a British manager answered that it was:

very difficult. I don't think you would get the same kind of *commitment* from people who are *only working part-time* (Emphases added).

In Japan, when asked the same question, there was only one manager who did not show an immediate dismissive response. The common reason given by the managers for this question was that managing people is a full-time job which cannot be performed by someone who is not there on a full-time basis. One Japanese manager expressed the feeling shared by the majority of the managers as follows

You [the author] ask a rather strange question, a part-time manager.....? I don't think workers can feel they would like to work hard under such a manager *who is not on site all the time*. I don't think we are ever going to introduce such a position (Emphasis added).

These statements clearly show that the physical presence at the workplace on a full-time, or probably more than full-time, basis is a symbolic gesture of commitment which is considered as an essential qualification to hold supervisory or managerial positions. This effectively excludes part-time/*pato* employees from occupying managerial positions since they are not perceived as possessing the right level of commitment.

The argument about the lower level of commitment of part-time/*pato* employees was not confined to managerial jobs. It was also referred to by the managers to construct the different and inferior value of *pato* compared with full-time/formal employees more generally, particularly in terms of the readiness to prioritise business demands over their private lives. Part-time/*pato* employees who were unable or unwilling to do so, were seen as less committed workers by the managers,

no matter how hard they worked and no matter what the quality of their performance was during the hours they were actually in the workplace.

In Britain, the majority of hotel managers told the author that they operate “flexible working practice”, which means that full-time employees were expected to be ready to adjust the timing of their working hours according to business fluctuation. In most cases, these employees were not paid any overtime when they worked longer during the busy times but were given time/days off when business was relatively idle. There were a few hotels where employees could choose either to take overtime pay or to take time/days off. Explaining how his hotel adjusted labour according to business fluctuation, one British manager stated that

We have basic staff. To cope with the busy time, we do not always recruit more people, but *ask staff to be a little more flexible* (Emphasis added).

The same manager then talked about the disadvantage of utilising part-time employees for management as follows.

It is difficult to rotate them sometimes. You haven't got the choice to say they have to work this hour. You know they can work only certain times. .... They often have *other commitments*, some have another job and others have *family to look after* (emphases added).

Certainly flexible working practice makes it very difficult for full-time employees in British hotels to have commitments outside work, as it does for women with families. It is this inability to prioritise work beyond fixed hours that is interpreted as a lack of commitment, not any reluctance to perform the job with enthusiasm within fixed working time. A British woman manager told the author that it was

indeed difficult for her to combine career in the hotel and family because of “flexible”, that is long and ever-changing, working hours and she was more or less forced to be single if she wished to maintain her career.

In Shirahama, by contrast, formal employees were usually paid for their overtime work and the flexible working practices of the UK examples were rarely adopted. Only one relatively large hotel in Shirahama utilised this practice for some of their formal staff. The manager, however told the author that, though he saw a labour cost reduction in adopting this practice, it would be difficult to introduce it for all of his staff as it proved “very unpopular” amongst employees. Two other managers also raised a serious doubt about this practice although they were studying its implications, and one of these two said that, although interesting, the hotel did not have any plans to introduce this practice in the near future.

However, in Japan formal employees are expected to extend their commitment to the work in the form of taking unplanned and very short-notice overtime in addition to fixed full-time working hours. This working additional hours is different from the flexible working practices in the British examples since workers in Japan are paid overtime and do not take time/days off for the compensation for this extra working hours. The willingness to do so was considered by some managers as a sign of their higher commitment to the work than *pato* employees. A Japanese manager, pointing to the fact that *pato* employees had not been requested to and had not worked overtime during the past three months in the hotel, stated that:

*Formal employees are expected to think company first. So they sometimes have to work unexpected overtime while *pato* are not expected to do so. *Pato could not think about work first as they tend to think of their family first* (Emphases added).*

This statement shows not only this manager's view of *pato* as less committed workers who cannot "think about work first" but also that this is linked with the position of *pato* employees outside of the labour market as women whose priority is given to their families.

It becomes clear that flexible working in Britain and unplanned and sudden overtime in Japan are systems which contribute to the creation of a labour market structure in which women with families are more likely to be pushed into often lower-grade and lower-paid part-time/*pato* employment. At the same time, employers construct a powerful discourse in which part-time/*pato* employees are represented as less committed workers. It should be emphasised that, as with the other qualitative aspects of the discourse, the difference in commitment of part-time/*pato* employees derives from quantitative differences based on their shorter working hours and upon their inability or unwillingness to fulfil the kind of commitment required from full-time/formal employees in the form of flexible working hours in Britain and unplanned overtime in Japan. In this context, it would be very difficult for part-time/*pato* employees to be considered by their employers as equally committed as their full-time/formal counterparts unless they actually become full-time/formal employees.

However, while managers constructed part-time/*pato* as uncommitted workers, there was no recognition of the clear lack of commitment on the side of management toward part-time/*pato* employees. As discussed earlier, in Japan, *pato* employees are used as an economic buffer and are likely to be made redundant before formal employees at times of business difficulties. In Britain, there were some part-time employees who did not have any fixed working hours at all although they regularly worked for particular hotels. One manager mentioned that in his hotel they exchange an employment contract, referred to as the “zero-hour contract”, with some part-time employees and their working hours were not specified at all in the contract. Under this agreement, according to the manager, the hotel does not have any obligation to provide work for the employees in this category while the employees do not have any obligation to work for the hotel even if requested. The manager explained that work was usually arranged when these employees telephoned the hotel, asking whether or not their services would be required during the following week or so (also see Dickens, 1992a: 8, 37-38).

The spread of this kind of contract has the potential to threaten further the security of jobs for employees in the already highly de-regulated British labour market. Under current British law, the key employment rights, such as those to claim redundancy payment and unfair dismissal, are subject to a certain length of continuous service. It is not clear how the continuity of employment would be assessed for employees in this category. Although it might be possible to establish the length of service from the date the contract is exchanged, it would be very difficult to establish whether and when the contract has been terminated if the

company stops providing any work for these employees. They could not claim a redundancy payment or unfair dismissal without establishing whether or not redundancy or dismissal has taken place. Obviously, this type of contract is advantageous for employers since it does not require any commitment from them to such employees. This demonstrates a clear lack of commitment on employers' side rather than on the side of part-time employees.

To summarise this section, first, the managers claimed that full-time/formal and part-time/*pato* employees performed different jobs and those given to the latter were simpler, lower-skilled and less responsible jobs. These differences in job content were explained by the managers as reflecting the inferior quality of part-time/*pato* employees based upon their shorter working hours. However, evidence showed that, while some lower-graded jobs were predominantly filled by part-time/*pato* employees, part-time/*pato* employees were also utilised in more skilled tasks. This demonstrates the partial nature of managers' representations of part-time/*pato* employees. Moreover, although part-time/*pato* employees were heavily utilised in lower-graded jobs, such as cleaning rooms and restaurant work, business needs for this arrangement can be identified since these jobs need to be done in a short and specific space of time: this is unrelated to the skills of the workers themselves or the quality of the work performed by them. These points undermine managers' view of job allocation based on the skills and/or the quality of employees and their construction of the inferior quality of part-time/*pato* employees.



Then, the managers also highlighted differences in the levels of responsibility and commitment to the work which, they assert, exists between full-time/formal and part-time/*pato* employees irrespective of whether or not these employees perform the same job at the workplace. As the clearest example of this, there were no managerial jobs given to part-time/*pato* employees in either Britain or Japan, and this was, according to the managers, because of the poorer understanding of business and the lower level of commitment to the work generally shown by part-time/*pato* employees. However, this commitment to the work, which was regarded as vitally important by most managers, demands more than working fixed full-time hours. Part-time/*pato* employees were seen by the managers as failing the test of commitment in two distinct ways, that is, their shorter working hours, and their inability or unwillingness to adjust their working hours in terms of the volume and/or timing, according to the fluctuation of business demands. Moreover, while the managers emphasised the lack of commitment on the side of part-time/*pato* employees, there was no recognition of the fact that the management does not have the same commitment to their part-time/*pato* employees as to their full-time/formal employees.

In analysing the qualitative differences from these aspects, I argue that in managers' minds the difference and inferiority of part-time/*pato* employment are imbedded in this pattern of employment itself. This point is demonstrated in the two stages of the constructive process. At the first stage, the managers insisted that the difference between full-time/formal and part-time/*pato* employees lies in not only quantitative but also qualitative differences in form of job content, responsibility and

commitment. However, the circular nature of managers' arguments of quantitative and qualitative differences is exposed since these differences were closely tied together. From managers' point of view, part-time/*pato* employees can perform only simple and piecemeal work because of their shorter working hours, they are given less responsible jobs and possess less knowledge of business because they are not at the work premises all day, and they are considered as less committed workers because they work shorter hours and/or cannot adopt working practices of full-time/formal employees, such as flexible or unplanned overtime working hours. This shows that the difference and inferiority of part-time/*pato* employees are not something which can be remedied by individual part-time/*pato* employees through, for example, improving the quality of performance of work within the fixed working hours. It also means that those who are employed on a part-time/*pato* basis would never be considered as equal to full-time/formal employees.

At the second stage of the discursive process, the crucial linkage between the labour difference discourse and what I identify as the gender difference discourse appears in relation to the imbedded difference and inferiority of part-time/*pato* employment. This is exposed particularly clearly in the above statements made by the managers concerning the different level of commitment between full-time/formal and part-time/*pato* employees since they linked part-time/*pato* employees' lack of commitment with their family commitment. It is suggested that the domestic position of part-time/*pato* employees as wives and mothers makes them less committed waged workers since they prioritise their family over the work, reflected in their inability to take up flexible working hours or unplanned overtime as their

full-time/formal male or single women counterparts are expected to do. This demonstrates that, while part-time/*pato* employment is constructed as a working pattern for those who carry domestic commitment outside the work, full-time/formal employment is constructed as a working pattern for those who are relatively free from such commitment. Here, the close association of the two discourses, the labour difference discourse and the gender difference discourse, in managers' minds appear clearly in constructing the hierarchy of employees.

These arguments make up what I have termed the labour difference discourse, which constructs a hierarchy of employees based upon the inferior quality of part-time/*pato* employees. I have attempted to expose some of the inconsistencies, contradictions and systematic misrepresentation contained within these views in order to demonstrate that they should properly be regarded as discursive constructions rather than as a reflection of the reality of part-time/*pato* employment. Now I will move onto the close analysis of the gender difference discourse formed by managers' arguments which constructs the different and inferior value of part-time/*pato* employees on gender-specific grounds.

#### **4. The Gender Difference Discourse: Gendering the Hierarchy**

In this section, I first examine the gender difference discourse by looking at the gender-specific distribution of certain jobs in hotels which are given a masculine or feminine identification. This process highlights gender difference since the managers explain the gender-specific allocation of certain jobs on the basis of perceived differences in the characteristics of men and women and/or what men and women do at home. As discussed in the previous section of this chapter, employers argue that it is the shorter working hours that determines the heavy utilisation of part-time/*pato* employees in certain types of jobs which are described by the managers as simpler and lower-skilled, such as cleaning and washing up. At the same time, these tasks are also widely considered by the managers in both Britain and Japan as women's work since they undertake such tasks at home. In this discourse the difference and hierarchy between full-time/formal and part-time/*pato* employment appears to be created based on gender by allocating jobs which are constructed as women's work and lower-skilled to part-time/*pato* employees. In doing this, part-time/*pato* employment is both gendered as women's and given a lower position in the hierarchy.

Secondly, I analyse the gender difference discourse in relation to the arguments put forward by the managers which emphasise the different and inferior person-quality of part-time/*pato* employees based on the gendered domestic position of these employees. In this discourse, the managers differentiate part-time/*pato* and full-time/formal employees by pointing out that the majority of part-time/*pato*

employees are women with families. Then, the managers translate the different domestic position of the sexes in the family into the hierarchy of employees at the workplace by constructing men as primary earners and, therefore, more serious and more committed workers while constructing women primarily as wives, mothers and, therefore, secondary earners who are less serious and less committed to the work. This demonstrates how the discourse produced by managers in employment institutions helps to create a hierarchical gendering of full-time/formal and part-time/*pato* employment.

### *Differences in Characteristics of Men and Women*

As discussed in Section 1, the majority of the workforce in the establishments surveyed in both Britain and Japan were women and various types of work were performed by them. When the managers were asked whether there were particular jobs which should be preferably carried by one of the sexes, they mentioned men far less than women in both Britain and Japan. The managers regarded many jobs in hotels as women's work and some expressed a general preference for women to men in their establishments. On the other hand, the clear demarcation of some jobs between the sexes was observed in most hotels surveyed although it appeared more rigid in Japan than in Britain. Some British managers, showing their awareness of legal requirements for equal treatment of men and women, emphasised that this happened not because of their policy but because of the scarcity of applications to particular jobs from one sex - men or women - and/or the demands of their guests.

Many managers in Britain and Japan expressed a preference for women over male employees in this particular industry. One British manager emphasised that women were preferred because they could bring their “special character” to the business. This invites the question of what this “special character” of women is which makes them suitable for jobs in the hotel industry. One British manager stated:

I prefer the hotel trade filled by female staff. .... I don't know why, just preference. .... Basically they are *cleaner*. We had two managers in the restaurant; one female and one male. The female manager got sick and tired of cleaning up after the male (Emphasis added).

Here cleanliness was regarded by the manager as a feminine characteristic and was an important factor for preferring women to men as workers.

A woman manager interviewed in Britain suggested another characteristic of women which made them a preferred workforce in the hotel. She told the author that

*Women were usually better in dealing with difficult guests* since they could handle them *more gently and patiently than male employees* (Emphases added).

This suggests that women were thought to be better at dealing with people and that these interpersonal skills were seen as a feminine characteristic. The preference for women to men based on this kind of view of women's characteristics was also shared by Japanese managers. Two Japanese managers said that they wished to use women for jobs which require dealing with the clients. One of the two stated that:

I think jobs which have contact with guests should be done by women and jobs behind the scenes should be done by men.

The third manager in Shirahama put this in other words saying that “women are preferred for any jobs which provide any kind of service for guests.” The fourth Japanese male manager in a hotel which belonged to a large hotel group, explained women’s suitability for working in the hotel industry, clearly underlining his view of interpersonal skills as a feminine characteristic as follows.

Women are very important to any hotel management. For example, I feel that our hotel *service* is not *personalised* enough in comparison to that offered by traditional independent inns in Shirahama, such as XXX Inn, which are run by *Okami* [a Japanese word which is usually used as a term of respect to refer to landladies in traditional inns and restaurants]. They make such a difference in *creating a tasteful warm atmosphere* (Emphases added).

These comments indicate that the reason why women are seen as good at providing service to other people is their expected feminine characteristics, such as, “patient”, “gentle”, “personal” and “warm”. This suggests that the utilisation of women in the hotel industry is often determined by what managers saw as gendered characteristics and roles. Jobs in each establishment were indeed distributed according to the gendered characteristics and stereotypes of men and women.

#### Women’s Work - Part-time/Pato Cleaners

As seen above, one of the characteristics which makes women managers’ preferred labour force in the hotels is their cleanness, and indeed, in the hotels in Warwickshire and Shirahama, housekeepers and chambermaids were almost

exclusively women. Many managers believed that housekeeping is a woman's job because women, not men, already possess the right qualities and skills for the job without being trained within the establishment. A British manager expressed this view when he talked about a housekeeper in his hotel who did not have any previous experience in the hotel industry as follows:

The other lady, she was not from hotels, the housekeeping lady, but she was *just a very good housewife*. She was very careful at home ..... so you really need *very good domestic people*. .... Women, generally speaking, especially *women who may not be trained in hotels* as such but they can be better if they have *a good domestic standard* (Emphases added).

A manager in Shirahama stated that:

Yes, the majority of our cleaners are women, though there are a few men too. I don't know why but *this is the way it is* (Emphasis added).

This statement was made by the manager in a fashion which indicates he does not understand why the author is questioning such an obvious and "natural" arrangement to use women as cleaners. However, the first statement shows that the British manager recognised that not all woman possessed these cleaning "standards" but some women acquired them through their domestic labour. Nevertheless, this skill was commonly valued least in term of remuneration since the rates of pay for housekeepers were the lowest in almost all establishments, positioning cleaning skills as the bottom of the hierarchy of skills. This means that the management does not need to provide training for these women and can pay them less only because the managers consider it largely as a "feminine characteristic" which women acquire in the domestic sphere.



More importantly for this study, many housekeepers and chambermaids were women employed on a part-time/*pato* basis and housekeepers' and chambermaids' jobs were most often cited by the manager as part-time/*pato* workers' as well as women's jobs, showing a significant overlap between part-time/*pato* workers' and women's jobs. This raises the question of whether women's jobs are given to part-time employees because the majority of them are women or, as Beechey and Perkins suggest (1989:144-149), whether many women work part-time because work gendered as women's is organised on a part-time basis. Although my research does not provide sufficient evidence to answer this question definitively, I can demonstrate that the gendered identification of jobs plays an important role in determining the distribution of work to part-time/*pato* employees. As discussed in the previous section, although the managers argued that it is the shorter hours of part-time/*pato* employees that determined the allocation of certain lower-graded jobs to them, this argument was questionable since part-time/*pato* employees were also used in women's skilled jobs. This suggests that the perceived gender identification of the work may be more important than the shorter working hours of part-time/*pato* employees and that it is feminized jobs which are organised on part-time/*pato* basis. This point will be discussed below in relation to guest room attendants in Shirahama. In any case, the strong linkage between what are seen as the characteristics of part-time/*pato* workers' and what are seen as the characteristics of women's jobs highlights the feminine identification of part-time employment.

Finally, although many managers sex-typed cleaning as women's work, some British managers showed their awareness of the legal requirement for equal treatment of men and women by emphasising that cleaners' jobs were occupied by women not because of their preference for women but because of external factors. When asked whether he preferred men or women for any particular jobs, such as cleaning rooms, a British manager stated that:

No. .... Well, I mean, obviously we cannot do *by law*. But for cleaning rooms, there is *a natural preference for ladies*. There is *guests' preference for ladies* to clean their rooms. .... If you are in a room and are getting ready, if a man comes into your room, you might feel a little uncomfortable (Emphases added).

This manager was clearly aware of the law and emphasised that it was not he but guests who preferred to have women cleaners. Another British manager stated that:

This is because of *traditional ideas*. There were *very few applications for this particular job from men*. We don't mind having men as housekeepers and we did have one before. We have *open policy for any job* (Emphases added).

This shows how the law has influenced and shaped the way in which the managers talked about the relationship between gender and the organisation of work in this area. This is a small but important change in terms of the formation of alternative discourse in employment institutions and shows the interaction of discourses produced in the legal and employment institutions.

### Women's Job - *Pato* Guest Room Attendants

Although women were obviously expected to cover a wide range of jobs in the Japanese hotels, particular attention should be paid to guest room attendants. It is important to distinguish them from housekeepers or chambermaids since their work consists not in cleaning rooms, but providing a personalised service for the guests. One of the particularly important features of their jobs is to serve dinner in individual rooms. This function is of great importance for traditional Japanese inns where dinners are provided for their guests as a part of a package. All establishments covered in the fieldwork in Japan, except one, maintained this service and a Japanese manager emphasised how important an attraction this was for guests who visited an old spa town such as Shirahama.

I think it is very difficult to stop serving dinner in individual rooms as guests come to Shirahama with the expectation of meeting a traditional spa-hotel service. We managed to stop serving breakfast in their rooms, asking guests to come down to the restaurants in our hotel, which is more cost-effective for us. But I don't think we can ask guests to come to the restaurants for their dinner as well. They will be very disappointed.

This comment shows the importance of this service and, hence, of retaining good staff who can perform the task well. This crucial job was almost exclusively carried out by women and considered by the managers as a women's job.

When the managers were asked why these guest room attendants had to be women, one manager in Shirahama stated that:

We consider that this [guest room attendant] is a professional job for women. ...Men are not suitable ... You don't want to see men coming into your room, do you? (Emphasis added.)

Interestingly, exactly the same point was raised in relation to housekeeping by a British manager, as noted above. However, the more important part of the above statement is that guest room attendants were considered by the managers as “a professional job for women”. The manager insisted that it is only women who possess the right characteristics to be trained as guest room attendants, suggesting that the specific feminine characteristics, such as gentleness, patience, and warmth, elevates women as “professionals” in meeting the needs of others in the hotel industry. The importance of these constructed feminine characteristics means that gender is a crucial factor in determining the allocation of this job to women. In support of this point, this highly skilled job was performed by many *pato* women employees despite the managers' view that *pato* employees were capable only of performing simple and piecemeal tasks. This demonstrates that gender, not the number of working hours, is the key factor in the allocation of guest room attendant's job to *pato* women employees.

#### Men's Job - Full-time/Formal Chefs

The examples of men's work mentioned by the managers were chefs, maintenance and jobs which involved carrying heavy goods, such as portering (both in Britain and Japan), night guards, and sales (in Japan). When one British manager was asked by the author whether there were any jobs in the hotel which should be done by men, he said:

.....the bar, when you are carrying barrels of beer. That is the only one. But it doesn't really matter as long as there is a male staff member somewhere around who can carry them.

Some of these jobs clearly indicate the general stereotyping of men. They are often expected to be physically stronger than women and this image is reflected in the idea of carrying, lifting and security duty as men's. Men are also expected to perform technical work such as maintenance.

On the other hand, there were many male chefs, and this makes for an interesting comparison with cleaning and guest room attendant jobs since cooking, alongside cleaning, is often performed by women at home. Despite the association of the chef's job with domestic work, it was performed mainly by men and organised on a full-time/formal basis, suggesting that it is not the association with domestic work *per se* which determines whether the job is given to men or women and organised on a full-time/formal or part-time/*pato* basis, but the constructed gendered characteristics attributed to the jobs. The British managers sex-typed this job less as men's than the Japanese managers and told the author more frequently that women were indeed employed as chefs in their establishments. However, many managers in Britain indicated that chefs' jobs were more likely to be filled by men than by women and be paid on a higher rate than some other types of jobs.

In Japan, the position of chef was considered as a highly skilled and masculine occupation and the great majority of the establishments studied in Shirahama had no women chefs. A Japanese manager stated that:

It is another world in the kitchen. Even the top management in the hotel could not interfere with what goes on there. Everything is organised under *Oyaji* [literally this means “father” but this term is commonly used to refer to the head [male] chef who manages the kitchen]. Well, I personally don’t think there is much space for women.

What this quote implies is the autonomy and authority of the chef’s role, and it is these characteristics which are identified as masculine. Work in the kitchen is often organised in a hierarchical fashion and chefs are generally expected to acquire the skill under apprenticeship in traditional Japanese inns and hotels. Chefs of traditional Japanese food, which was served in all the establishments studied except one, were particularly strongly sex-typed as men’s in the minds of managers. A few hotels mentioned that there were or had been women in their kitchens, but these women were either seen as marginal helping hands or as very exceptional. Reflecting their highly regarded skills, one Shirahama hotel manager told the author that the earnings of the head chef in their hotel was the second highest after the general manager. This shows that, although guest room attendants were seen as a highly-skilled job for women, and chef was a highly-skilled job for men, there was no comparison between them in the degree of recognition given by employers to the skill and responsibility involved.

Most significantly for this study, male chefs were rarely employed on a part-time/*pato* basis in either Britain or Japan while receptionists and guest room attendants were organised on a part-time/*pato* basis despite the fact that these were also considered by the managers as skilled jobs. This suggests that jobs seen as

feminine are more likely to be organised on a part-time/*pato* basis even if considered as skilled, whereas jobs regarded as masculine, such as chefs, are seen as skilled jobs and are more likely to be offered as a full-time/formal basis. This association of full-time/formal employment with masculine skilled work and part-time/*pato* employment with feminine skilled work, contributes to the creation and reinforcement of a gendered hierarchy between full-time/formal and part-time/*pato* employment.

What is shown by the examination of part-time/*pato* cleaning jobs and guest room attendant jobs, is that it was their sex-typing as jobs requiring female characteristics which accounts for the fact that they were mainly organised on a part-time/*pato* basis, not the number of working hours or the level of skill involved. Indeed, although the interpersonal skills of guest room attendants were given more recognition by the managers than the domestic skills of cleaning, the crucial features of these jobs to which managers drew attention were the essentially feminine qualities and characteristics which they saw as necessary for the successful performance of the job. On the other hand, the examination of the full-time chef's job shows that it was its sex-typing as a job requiring masculine characteristics of autonomy and authority as well as explicitly recognised technical skills, not its association with domestic work, which accounts for the fact that it was organised on a full-time/formal basis. It is this construction of the essential differences in the characteristics of men and women, and the attachment of these gendered differences to particular jobs, which I analyse as part of the gender difference discourse. Indeed, skill itself may be seen as one of these gendered characteristics. The

discursive construction of the hierarchy of feminine and masculine skills means that feminine part-time/*pato* jobs can be categorised as less valuable than masculine full-time/formal jobs, so justifying the inferior worth of women's part-time/*pato* work. Thus the discourse of part-time work as less valuable than full-time work is ultimately a gendered discourse.

### *Differences in Domestic Position*

The managers in both Britain and Japan often differentiated part-time/*pato* women workers from full-time/formal workers by referring to the fact that the majority of part-time/*pato* women employees were those with families. The managers, then, stated their view of these women employees as primarily mothers and wives for whom paid work was a secondary activity. One British manager stated that:

Taking this hotel as an example, part-time ladies we have work here on a part-time basis because either *they have children* or another job in the daytime. Whereas men work [on a part-time basis] here in addition to another job *not because of family obligations*. Some [women] can spare a certain numbers of hours because *they have to look after children*. ..... Only one reason for men but two reasons for women (Emphases added).

When asked about any possibility for regular part-time workers to be promoted while keeping part-time status, another British manager stated that:

You find them [part-time workers] *mostly mothers*, mostly women, *mostly mothers with young children*. At the moment *they don't wish to further*



*their career. They are just providing some extra money for home*  
(Emphases added).

In Japan, when asked by the author what are the disadvantages of using *pato* employees, a manager stated that:

We cannot expect too much of *pato* employees. They have *family* to think of. They only wish to work when they have spare time. If it is too inconvenient, they don't stay (Emphasis added).

Another Japanese manager answered when he was asked why *pato* employees were not covered by social welfare schemes, unlike their formal counterparts, as follows:

*Pato* often say to us that they don't want to be in the social welfare scheme. Some say "oh, well, *my husband is covered* by this scheme. So I do not need it" (Emphasis added).

These statements demonstrate that the managers not only recognise the fact that the majority of part-time/*pato* employees are women with families and can work limited hours at certain times because of their family commitments, but also interpret this in a way that constructs the inferior value of these women employees in comparison to their male full-time/formal counterparts. While part-time/*pato* women employees are constructed as those who give priority to the family, and therefore as inferior workers, the responsibilities of men as husbands and fathers are constructed as compatible with, and fulfilled by, giving priority to paid work.

The above managers' statements also indicate that part-time/*pato* employees were seen as women with husbands or partners, primarily supported by them, and who participated in part-time/*pato* employment only for "some extra" but not essential money for their families. This implies that the managers saw these women primarily as wives and mothers, and the secondary earners of their families, and interpreted this to mean that part-time/*pato* employees were less serious about their work and less committed to the work. Thus, the managers concluded that there was no need to treat these two different groups of workers equally.

Moreover, while attempting to explain the difference and inferiority of part-time/*pato* employees on the grounds of their lower level of commitment because of giving priority to family over work, the managers also claimed that women themselves "choose" part-time/*pato* employment in order to give priority to the family. This implies that it is women, rather than the management, who exercise the freedom of choice to be different and to work under poorer working conditions. This emphasis obscures the advantages enjoyed by employers when they utilise women as lower-grade, lower-paid, and less secure part-time/*pato* employees with little promotional prospects, and fails to explain why women would choose poorer working conditions even if they did decide to work fewer hours because of their domestic circumstances.

However, there were a few managers who provided a different view against the majority of managers in both Britain and Japan who emphasised the domestic circumstances and personal choice of women to take up inferior terms and conditions of part-time/*pato* employment. One British manager stated that:

*The advantages of part-time employment are both ways. They want to work a certain number of hours and we need extra workers during certain hours of the day* (Emphases added).

This statement points to the business need for and advantage in utilising part-time workers. Moreover, the usefulness of part-time/*pato* employees for the management is not limited only to the adjustment of labour according to the changing needs for labour power during the day. One Japanese manager stated that:

an establishment like ours [which is not a large company], could not provide career tracks for all employees according to their length of service. We need workers [such as *pato*], who do not expect to be promoted even if they work continuously for us. If they want a promotion, they have to move.

This statement suggests that *pato* employees were expected not to have promotional aspirations, demand promotion from employers, nor compete for promotion against their formal counterparts.

So although it is true that many part-time/*pato* workers are women with family responsibilities, the different gendered position of the sexes was assumed by the managers to mean that women did not need or want better pay or career prospects and that their family obligations rendered them less committed to work. Moreover, poorer pay and working conditions were also justified on the grounds that women “choose” to work under inferior conditions, ignoring the fact that there were distinct benefits to employers in terms of business needs for labour, the inability of a hierarchically shaped organisation to provide promotion for all, and a lower wage bill. I identify these arguments about the inferior worth of part-time/*pato* women

workers on the grounds of their gendered domestic position as part of the gender difference discourse. In challenging this discourse, I argue that women's gendered domestic position does not mean that part-time/*pato* women workers do not want or need better pay or prospects of promotion; it does not mean that women part-time/*pato* workers necessarily have male partners to rely on financially; nor does it mean that the only reason for taking part-time/*pato* work is because of family commitments. As evidence presented in Chapter 3 shows, there were several other important factors leading to women's participation in part-time/*pato* work besides family commitment, such as being in education, not requiring full-time wages, and above all not being able to find a full-time/formal job. The powerful construction of the gendered domestic position of part-time/*pato* women employees as wives and mothers obscures the other reasons for women to be part-time/*pato* employees.

In this section, I first looked at the crucial role which has been played by gender in determining the attribution of certain jobs to men or women at the establishments surveyed. Employers explained the heavy utilisation of women in certain types of jobs, such as cleaning, on the assumption that women are more suitable for these tasks because of a feminine characteristics and/or attributes gained in undertaking such tasks at home. What were considered as women's jobs also often corresponded to tasks which were allocated to part-time/*pato* employees. Here I demonstrate managers' reliance upon the gender difference discourse in order to legitimise the allocation of less valued work to part-time/*pato* employees based on the sex of the majority of these employees. Second, I analysed managers' arguments linking the gendered domestic position of part-time/*pato* employees with their

inferior quality as workers. In addition, the managers often pointed out that it was indeed these women themselves that “chose” to be part-time/*pato* employees since they were primarily wives and mothers rather than waged workers.

As discussed in the previous two sections, the managers adopted the labour difference discourse to construct the different and inferior value of part-time/*pato* employees on the grounds of apparently gender-neutral factors. Two of these factors were the shorter and less flexible working hours of part-time/*pato* employees and their assumed lower level of commitment to the work compared to their full-time/formal counterparts. However, the labour difference discourse is inextricably bound up with the gender difference discourse since the apparently gender-neutral factors were often seen by the managers to have originated from the gender-specific position of part-time/*pato* women employees within the family as wives and mothers. This point was most clearly made by one Japanese manager who expressed the lower level of commitment he perceived amongst *pato* employees by stating that “*pato* could not think about *work first* as they tend to think of their *family first* (emphases added)” as noted in the previous section. So again the discourse of part-time/*pato* employment as less valuable than full-time/formal employment should be seen as an ultimately gendered discourse. The gender difference discourse, alongside the labour difference discourse, supports the gendered hierarchy of employees and the inferior position of part-time/*pato* employees, constructing the different and inferior value of these employees compared to those of full-time/formal employees in both Britain and Japan.

## Conclusion

The above analysis shows two processes in Britain and three in Japan in employers' construction of the hierarchy of employees, which builds the inferior value of part-time/*pato* employees upon constructed differences between them and full-time/formal employees. In Japan, first, employers have excluded disguised *pato* employees who work as long as their formal counterparts from their construction of *pato* employment. Otherwise there would be obvious difficulties in presenting a compelling argument for treating *pato* employees separately from their formal counterparts on the basis of their shorter working hours and/or their qualitative inferiority in terms of job content, responsibility and commitment (which are closely tied with their shorter working hours). Moreover, the differentiation of disguised *pato* from formal employees highlights a more important determinant of the inferior position of *pato* employees than their shorter working hours, that is contractual employment status. This differentiation based upon contracts can be seen more readily as the discriminatory treatment imposed by employers upon a particular group of employees, *pato* employees, the majority of whom are women, than the differentiation of these employees based upon their working hours. This fact is obscured by employers' discursive exclusion of disguised *pato* from the general category of *pato* employees. This part of the process is specific to Japan, where *pato* employees consist of the two distinct groups, disguised and genuine.

The second and third processes are shared in both Britain and Japan although to a differing degree. In the second process, employers emphasise the difference of part-

time/*pato* from full-time/formal employees in terms of apparently gender-neutral, labour-related factors such as working hours, stability, job content, responsibility and commitment to the work. The inferiority of part-time/*pato* employees is constructed on the basis of these differences, as part-time/*pato* workers are discursively produced not only as those who work fewer hours but also as those who are unstable, perform simpler and less responsible jobs, have less responsibility and are less committed to the work. This discursive production of the hierarchy of employees based on apparently gender-neutral, labour-related factors, I have termed the labour difference discourse.

In the third process, employers emphasise the difference of full-time/formal and part-time/*pato* employees in terms of gendered factors such as the masculine and feminine characteristics required for particular jobs, and the different domestic position of men and women. The inferiority of part-time/*pato* to full-time/formal employees is constructed on the basis of these differences, as part-time/*pato* workers are discursively produced as those who possess no or less valuable skills in comparison to full-time/formal male workers and draw upon “natural” feminine qualities and who are less serious workers because of their family commitments. According to employers, these women “choose” to be employed on a part-time/*pato* basis with inferior terms and conditions in order to give priority to the family over paid work. This discursive production of the hierarchy of employees based on gendered factors, I have termed the gender difference discourse.

Although the labour difference and gender differences are identified as distinct and examined separately for the purpose of analysis in this chapter, these two discourses

appear in an inextricably linked form in the employment context. The gender difference discourse is linked with the labour difference discourse in two ways. First, feminine characteristics required for jobs sex-typed as female are recognised by the managers as less valuable qualities than masculine characteristics required for jobs sex-typed as male. So skills required for women's jobs are appreciated less than skills required for men's jobs and jobs with more valuable content are ultimately gendered as male. Second, the two discourses are linked in that women's gendered domestic position as wives and mothers is constructed as giving a priority to family responsibilities and a low commitment to work, whereas men's gendered domestic position as husbands and fathers is constructed as a high commitment to work and a low priority to family responsibilities. So commitment to work is ultimately gendered as male. This close binding of the two discourses in the employment context is a marked difference from the legal context since the two discourses in the law appear much more independently as will be seen in the next two chapters.

Furthermore, there are differences in managers' arguments about part-time/*pato* employment in Britain and Japan. First, the Japanese managers I interviewed openly admitted that one of the most important functions of *pato* employees for them was to be an economic buffer at the time of business difficulties. They repeatedly emphasised their commitment to secure jobs for formal employees even if this is achieved at the expense of *pato* employees. On the other hand, the British managers did not indicate such a clear priority to the maintenance of jobs for full-time employees. Secondly, the Japanese managers expressed more clearly their view of



gender differences particularly in relation to the distribution of jobs within their establishments in comparison with their British counterparts, particularly those in large establishments, who carefully avoided making gender-specific remarks and emphasised their policies to promote sexual equality.

These two different aspects of managers' responses in Britain and Japan can be linked with differences in the legal treatment of sexual discrimination in the two countries. First, in Britain making part-time employees redundant before full-time employees may amount to sexual discrimination since the majority of these are women (see Chapter 5). On the other hand, the Japanese courts strongly emphasise the unacceptability of shedding formal employees while, in doing so, more or less supporting the practice of dismissing *pato* employees before formal employees at the time of business difficulties (see Chapter 6). Reflecting these different legal approaches, the Japanese managers talked about one of the functions of *pato* employees as acting as an economic buffer while the British managers did not. Alternatively, it can be said that in Britain there is no commitment to maintaining jobs for full-time employees, any more than those of part-timers. Secondly, anti-discrimination law is enforced more strongly in Britain than in Japan. The careful avoidance by some British managers of gender-specific statements shows their awareness of the legal requirement for equal treatment of men and women.

This chapter, nevertheless, demonstrated that through both labour difference and gender difference discourses, employers in both Britain and Japan have constructed the hierarchy of employees based upon the inferiority of part-time/*pato* employees.

It is this hierarchy which allows employers to legitimise the less favourable treatment of part-time/*pato* employees at the workplace in pay, other benefits, and job security. What is particularly important here is that the construction of the inferiority of part-time/*pato* employment has been made in accordance with the particular construction of the identity of part-time/*pato* women employees in current British and Japanese society. The proper place of such women with families is primarily considered as home and they are supposed to be supported by their husbands or partners. In this context, employers and managers are clearly constructing part-time employment as a sex-specific pattern of employment, suitable for women with families, and in doing so are helping to bring about the hierarchical as well as gendered differentiation of employees.

Through the power of discourse, management takes advantage of the social position of women as the constructed hierarchy of employees enables them to argue successfully that equal treatment of part-time/*pato* employees is inappropriate, unnecessary, or undesirable. The necessity of some legal regulation of part-time/*pato* employment was recognised precisely because of this exploitation of women by employers. However, it is open to question to what extent the law can rectify the current situation for part-time/*pato* employees in Britain and Japan. This is not only because of some technical problems, such as the inadequate enforcement measures, in the law. The fundamental problem lies in the discursive power of the law in consolidating the hierarchical and gendered differentiation of employees, interacting with employers' discourses of part-time/*pato* employment.

## **CHAPTER 5: PART-TIME EMPLOYMENT IN BRITISH LEGAL INSTITUTIONS**

### **Introduction**

The previous chapter analysed how the labour difference discourse and the gender difference discourse are produced and circulated in employment institutions, constructing a gendered hierarchy between full-time/formal and part-time/*pato* employees. In this and the following chapters, the focus moves to the operation of these two discourses in the legal institutions in Britain and Japan respectively.

Although the same two discourses, the labour difference discourse and the gender difference discourse, can be identified in both employment and legal institutions, these discourses operate in distinctive ways in these institutions. In employment institutions, the two discourses are closely bound together in differentiating full-time/formal and part-time/*pato* employees and positioning them hierarchically. On the other hand, in the legal institutions the gender difference discourse does not come to the surface while the labour difference discourse helps to stage a hierarchy of employees based upon supposed differences in labour-related factors and favours full-time /formal over part-time/*pato* employees.

The contrast observed in the operation of the two discourses between the employment and legal institutions, can be explained by different institutional structures in the two. In the employment institutions, employers and managers are

relatively free to talk about the intimate connection between gender and the less favourable treatment of part-time/*pato* employees. In the legal institution, law-makers and adjudicators are restricted in doing so since the discourse of sexual equality also operates there and the charge of sexual discrimination must be avoided. This prevents the binding of the two discourses and the appearance of the gender difference discourse in the process of the legal construction of hierarchical differentiation of employees. It should be noted, however, that the ostensibly gender-neutral construction of the hierarchy of employees in the legal institutions cannot prevent discursive power from operating interactively within them and across legal and employment institutions. This reveals the thinly veiled gender difference discourse behind the labour difference discourse, as well as the gendered differentiation of full-time and part-time employees.

In recent years in the British legal scene, however, the gender difference discourse has come to the surface in the attempt to equalise the treatment of full-time and part-time employees through the application of the anti-discrimination legislation based upon the fact that the majority of part-timers are women. In this context, the gender difference discourse is introduced into the discussion of part-time employment in order to challenge the hierarchical division of full-time and part-time employees which has been created by and based upon the labour difference discourse. This operation of the gender difference discourse in the British legal institution is in marked contrast to that in the Japanese legal institutions.

In this and the following chapters, I aim to demonstrate the distinct ways in which the labour difference discourse and the gender difference discourse operate in legal institutions in Britain and Japan in turn. As pointed out above, there are differences in the operation of these discourses not only between employment and legal institutions but also between Britain and Japan. This chapter focuses upon how part-time employment is constructed in the area of employment law in Britain, paying particular attention to the way in which the sexual equality approach has shifted the focus of the main legal discourse surrounding part-time employment from labour difference to gender difference since the late 1970s. Then, the next chapter examines how *pato* employment is constructed in Japan, focusing upon the role of the courts and the implications of the introduction of a new piece of legislation, the Law on Part-time Employees in 1993, to the creation of the hierarchical differentiation of employees.

This chapter is divided into four sections. In Section 1, I outline briefly the contents of the British statutes examined in this chapter and the analytical method applied to the examination of these legal materials. Then, in Section 2, I examine the relevant sections of statutes and the decisions of the Industrial Tribunals and courts delivered in the late 1970s in order to demonstrate the hierarchy of employees constructed in the law through the operation of the labour difference discourse. In the 1970s part-time employees were marginalised not only by employers but also by statutes and adjudicative institutions, and the less favourable treatment of part-time employees was legitimised by their assumed inferiority in terms of labour-related factors in these fora. In particular, until recently employees were differentiated by

the number of their working hours as specified in the Employment Protection Consolidation Act (EPCA) 1978 in regard to access to such fundamental employment rights as claiming unfair dismissal and redundancy pay.

Behind the legitimisation of the less favourable treatment of part-time employees, a set of arguments can be identified which highlight the inferior value of part-time employees compared with full-time employees based upon differences in labour-related factors such as working hours and “commitment”. These arguments form the labour difference discourse in the legal regime, which produces the hierarchy between full-time and part-time employees on apparently gender-neutral grounds. In this process, the reference to gender is carefully avoided so as to create an impression that this differentiation of employees is not based upon sex but the difference and inferiority of part-time employees which appear in labour-related factors. This legitimises the less favourable treatment of part-time employees and enables employers to impose poorer working conditions on these employees legally.

Following this, in Section 3, I examine cases brought by part-time women employees under anti-discrimination legislation to challenge employers over discriminatory employment practices at work in the 1980s. In these cases, the less favourable treatment of part-time employees at work is viewed as being discriminatory against women on the grounds that the majority of part-time employees are women. Initiated by this sexual equality approach, another set of arguments was brought into the discussion of part-time employment. These arguments emphasise the gendered domestic position of women as wives and

mothers whose primary responsibility is to provide care for their families. This has formed the gender difference discourse in the field of employment law. This discourse has become the dominant legal discourse surrounding part-time employment in the British legal scene in recent years, rather than the labour difference discourse. In particular in this section, the active utilisation of the concept of indirect discrimination in the attempt to improve the situation of part-time women employees is analysed in terms of the promotion of the gender difference discourse. The gender difference discourse found in European Union (EU) law is also analysed here since it has influenced the gender-specific development of British legal arguments concerning part-time employment and of its legal treatment.

In Section 4, I examine cases which question and challenge the statutory differentiation of employees set out in the Employment Protection Consolidation Act (EPCA) 1978 based upon the requirements of working hours and length of employment to achieve qualification for various employment rights. First, the ambiguous and artificial nature of divisional boundaries between employees created by these qualifying requirements will be exposed through the exploration of cases brought in the 1980s. I then pay particular attention to a recent landmark case where the Equal Opportunities Commission (EOC) directly challenged the legality of the requirement of working hours in the EPCA under the EU law on the basis that women were more likely than men to be disadvantaged by this rule and this was, therefore, against the principle of sexual equality. This case is analysed here as an attempt to break down the statutory hierarchy of employees built upon the

labour difference discourse, through the innovative use of the gender difference discourse.

The sexual equality approach has brought part-time women employees in Britain considerable legal gains in recent years under anti-discrimination legislation of Parliament and/or EU law and this is by no means insignificant. However, this approach focuses more on the fact that the majority of part-time employees are women, linking part-time employment with the gendered domestic position of these women, rather than drawing attention to the equal value of work performed by full-time and part-time employees during a unit of time. In doing so, this approach does not deconstruct thoroughly the hierarchy of full-time and part-time employees created by the labour difference discourse while it provides the inferior pattern of employment, part-time employment, with a feminine identification. Here can be seen the emergence of the hierarchical as well as gendered construction of full-time and part-time employment.

As a consequence, although the sexual equality approach has improved the legal position of women in part-time employment in some respects, reliance upon the gender difference discourse has generated an unexpected effect. Women have been redefined through the discursive power of law not only as wives and mothers who perform domestic work but also as part-timers who are inferior to full-time workers, whereas men's identity is intact as primary earners in the family, and "proper" and therefore superior waged workers who do not carry domestic responsibility. This has contributed to the shaping and reshaping of the division of



labour between the sexes, which allocates unpaid domestic work to women, and to the sexual segregation of the labour market, where a large proportion of women are in the less privileged part-time sector, while men are freed from domestic responsibility and are assigned to privileged full-time work.

## **1. Analytical Method and Legal Materials**

Prior to the analysis of actual discourses, I outline briefly the legal materials which will be discussed in the following sections of this chapter and the method adopted to analyse them.

There are three types of legislation in the area of employment in Britain, which are examined in this study. The first type of legislation is reflected in the Employment Protection (Consolidation) Act (EPCA) 1978 which provided a so-called “floor of rights” for employees, including such important rights as those to claim unfair dismissal, to claim redundancy pay, to receive maternity payments and return to work after maternity leave. (Note: Since the time of writing, these rights have been consolidated in Employment Rights Act 1996 with other various employment rights.) These are basic employment rights and protections for workers, including both men and women, and full-timers and part-timers. So fundamental are these rights considered to be that, enshrined in legislation in the way that they are, they cannot be restricted by individual or collective agreements (for the comprehensive content of employment law in Britain, see Wedderburn, 1986; Smith and Wood. 1993).

Despite the fact that those rights are often assumed to be universal, their application is circumscribed by criteria which employees must meet before they can be qualified for the rights, leaving some employees not covered by these “fundamental” rights. Section 2 of this chapter pays particular attention to this differentiation of the

employees created by the law, based on their working hours, and I suggest this can be seen as the creation of a statutory hierarchy amongst employees which is achieved through the operation of the labour difference discourse. Section 4 examines how this hierarchy is challenged by the sexual equality approach based upon the gender difference discourse when the requirement of working hours to be eligible for the various employment rights was removed in 1995.

The second type of employment law to be examined in this chapter is anti-discrimination legislation, the Equal Pay Act (EqPA) 1970 and the Sex Discrimination Act (SDA) 1975. While the EqPA covers discrimination in pay and related matters arising from existing contracts, the SDA was intended to handle any non-contractual matters as well as non-financial aspects of contracts. Although the EqPA and SDA were expected to have complementary effects, the two pieces of legislation have not always provided the assumed comprehensiveness in practice (see *ID Meeks v. National Union of Agricultural & Allied Workers* [1976] IRLR 198 where a complaint was dropped because of a lacuna between the two Acts. see Section 2). The EqPA requires employers to treat their male and female employees equally in regard to pay if a woman is employed i) “on like work” with men in the same employment (s. 1(2)a, EqPA); ii) “on work rated as equivalent” with that of men in the same employment as determined under a valid job evaluation scheme(s. 1(2)b, EqPA); or iii) “on work of equal value” (s.1(2)c, EqPA).

Under the SDA, discrimination on the grounds of “sex” (ss.1 and 2, SDA), “marriage” (ss.1 and 3, SDA) and “by way of victimisation” (s.4) is regarded as

unlawful whether it occurs in the form of direct or indirect discrimination. Direct discrimination (s.1(1)a, SDA) occurs when an employer treats an employee less favourably directly on the grounds of sex. Indirect discrimination (s.1 (1)b, SDA) occurs when an employer adopts “a requirement or condition” which one sex is less able to meet than the other and employers cannot justify the necessity for this. In addition it covers discrimination not only at work but also in such areas as education and the provision of services. Major amendments were made in 1983 to the EqPA and in 1986 to the SDA under the influence of European Union law when a provision of equal pay for work of equal value was added to the EqPA, and the scope and application of the SDA were extended to such matters as internal work rules and to institutions of five or fewer employees.

In this study, the EqPA and SDA are examined first in terms of their different accessibility, particularly in the original form, for full-time and part-time employees. Although the amendments made it easier for women in part-time employment to bring their cases under these acts, full-time employees have a better possibility to do so, and I suggest that this facilitates and rests upon the formation of the hierarchy of employees and the labour difference discourse. This point will be discussed in the Section 2. Then, in Section 3, the application of the Acts to the situation of part-time women employees is examined in terms of the introduction of the gender difference discourse into the legal discussion of part-time employment (for the explanation of the general contents of the anti-discrimination legislation see; Palmer, 1992; Bourn and Whitmore, 1993).

The third category of legislation is the European Union (EU) law, Article 119 of the Treaty of Rome and the Directives relating to the equal treatment of men and women at work. The former sets out the basic rule of equal pay for equal work between the sexes and the latter further expands the principle of equal treatment of men and women at work in the EU member states. The United Kingdom, as a member state of the European Union, is obliged to comply with EU law (Art.5, the Treaty of Rome) and the Treaty of Rome is directly applicable in every member state. This means that, where the existing domestic law is not in line with the EU law, applicants can rely directly upon the Treaty of Rome to seek legal remedy. Unlike the Treaty of Rome, the Directives are not directly applicable in the member states although the European Court of Justice (ECJ) has indicated that an applicant may be able to have the Directives enforced if the employers of applicants can be considered as the state or organs or emanations of the state (see *Marshall v. Southampton & South-West Hampshire Area Health Authority (Teaching)* [1986] QB 401; *Foster v. British Gas plc* [1991] 2 AC 306. The House of Lords confirmed the wide interpretation of “the state or organs or emanations of the state”, including such institutions as British Gas, a former state-owned organisation, in this category). In considering the great influence which the EU law and the ECJ can exert over the development in the area of sexual equality, I examine the construction of women which appeared in the main European legal institution, the ECJ, in Section 3 (for the overall picture of the EU law in the area of discrimination, see Ellis, 1991; Hoskyns, 1996).

In Britain, cases are another important source of law and various cases are examined in the following sections of this chapter, which were introduced under the legislation mentioned above. The cases examined in this chapter are employment-related disputes which largely proceed as follows. A case is first referred to the Industrial Tribunal (IT). It can then be appealed to the Employment Appeal Tribunal (EAT), the Court of Appeal and finally the House of Lords. The case may be referred to the European Court of Justice (ECJ) at the stage of appeal. Decisions given in a particular case by higher courts take precedence over those given by lower courts and the House of Lords binds all lower courts (for the detail of legal process in England, see Ingman, 1994).

The materials which are dealt with in this chapter are the main statutes in the area of employment and relevant decisions delivered by adjudicative institutions, including Industrial Tribunals and courts. As discussed above, the aim of this chapter is to examine how part-time employment is constructed in the British law, focusing upon the two discourses identified surrounding part-time employment, the labour difference discourse and the gender difference discourse. For this purpose, I look at the relevant legislation and cases as texts where these discourses can be found (also see Chapter 1 for the methodology adopted in this study). As a result, the following sections of this chapter focus upon specific sections of statutes which underline the existence of one of the two discourses. Decisions of both lower and higher adjudicative institutions in individual cases are explored with equal interest in order to understand not only the outcome of a particular case and the establishment of case law but also the process of the production of particular discourses.

## **2. The Labour Difference Discourse: Creating the Hierarchy of Employees**

This section examines the construction of a hierarchy between full-time and part-time employees based upon the labour difference discourse in statutes and cases. This hierarchy of employees appears to be gender-neutral since the labour difference discourse does not refer to gender but focuses upon the difference and inferiority of part-time employees in labour-related factors. Through the operation of the labour difference discourse, the gender-specific nature of part-time employment is obscured in legal arguments although its gender specificity can be easily inferred from discourses outside the legal regime, such as those produced by employers, with which legal discourses interact.

First, this section examines the statutory hierarchy created by the EPCA 1978 which privileges one group of employees over another through providing full rights and/or protections to some while denying or limiting these to others according to the selected criteria. Until the 1995 amendment, it used the criteria of the number of working hours and the continuous period of employment. This has contributed to the creation of a hierarchy of full-time and part-time employees who are differentiated by their working hours. The anti-discrimination Acts also has contributed to the creation of the hierarchy between full-time (women) and part-time (women) employees although less directly than the EPCA, by implementing provisions which disadvantaged the latter more than the former. After looking at the statutory hierarchical differentiation of employees, this chapter explores legal arguments in cases which underline the labour difference discourse prevailing in the

British legal institutions in the 1970s. During that time, the labour difference discourse operated explicitly to construct the inferiority of part-time employees and legitimise the less favourable treatment of these employees at work as well as in the statutes.

### *Statutory Differentiation*

#### The EPCA 1978

Prior to the amendments in October 1994 and February 1995, the EPCA excluded those who worked less than eight hours per week from key employment rights, such as the right to claim redundancy payments, the right to claim unfair dismissal, and the right to have maternity leave and return to work after the leave. It also treated less favourably those who worked between eight and 16 hours per week than those whose working hours were 16 or more by requiring the former to fulfil a longer threshold of continuous employment, five years, than the latter, two years, to qualify for these rights. This has created hierarchical divisions amongst employees based upon the number of working hours and the length of service since the EPCA privileged those who worked more than 16 hours or more per week by providing them with full rights.

As will be discussed below, in a recent case the House of Lords suggested that the particular view of part-timers as less committed workers than full-time employees had played a significant role in setting a requirement of a minimum number of working hours in the EPCA 1978 (*R. v. Secretary of State for Employment, ex*



*parte Equal Opportunities Commission* [1994] 2 WLR 409, see also Section Four of this chapter). The supposed lesser level of commitment of part-time employees to work is a key element of the labour difference discourse produced by employers as shown in the previous chapter in constructing the inferiority of these employees and legitimising the less favourable treatment of them. This demonstrates that the statutory differentiation of employees has produced and relied upon the labour difference discourse, as do employers.

The hierarchy of employees constructed by the statute has profound ideological implications for the position of part-time employees since the EPCA suggests that some employees who work less than a certain number of hours per week deserve only an inferior level of protection compared to other workers. O'Donovan argues that the non-existence of law or the lesser level of regulation in particular areas is as politically significant as its existence, referring respectively to the different levels of legal intervention in the labour market, which is considered as "men's" sphere, and the domestic domain, which is, to the contrary, considered as "women's" (1985: 201). Here I should like to extend O'Donovan's argument to a particular segment of the labour market, the part-time labour market, which is perceived as "women's" and was provided with a lesser level of legal intervention than the full-time market.

Moreover, the hierarchy, once established in the law, reinforces the labour difference discourse which highlights the different and inferior value of part-time employees. The law, with its authority in society, helps to construct the difference of part-time employment and, based on this constructed difference, creates the

hierarchy between full-time and part-time employees which legitimises the differentiated treatment between full-time and part-time employees. In doing so, the law indicates that part-time employees, particularly those who work less than the qualifying working hours, are not “proper” workers who deserve the same level of protection as “standard” and therefore, “proper” full-time employees. Here an interdependency between the discursive construction and the way in which part-time employees are regulated by the law can be suggested: while the differentiated treatment of employees based upon working hours creates the “atypicality” and marginality of part-time in contrast to full-time employment, this discursive construction legitimises the differentiated treatment (for a discussion of part-time workers as one of the atypical groups of workers in Britain, see Dickens, 1992a). However, the boundary of the hierarchical divisions between the two categories of employees, typical and atypical workers, workers who deserve rights and who do not, or full-time and part-time employees, has by no means been clearly marked since qualifying requirements have been constantly challenged and altered as discussed in Sections 3 and 4 of this chapter.

### The Anti-discrimination Acts

The EPCA is not the only legislation which contributes to the creation of the hierarchy between full-time and part-time employees by putting the latter in a more disadvantaged position. Anti-discrimination Acts also contain provisions which can be seen as operating against part-time employees, although in a more subtle way than the EPCA, and which facilitate the creation of the hierarchical division between full-time and part-time employees.

The Equal Pay Act (EqPA) originally required employers to pay men and women equally if they do either “like work” or “work rated as equivalent”, without encompassing the concept of “equal pay for work of equal value”. The problem of stipulating only two original provisions is that, first, relatively fewer women can meet the requirement of “like work” because of sexual segregation as a result of which men and women tend to work in different jobs. Second, although the existence of a valid job evaluation scheme is a prerequisite to follow the route of “work rated as equivalent”, it was and remains relatively uncommon at the workplace and the EqPA cannot force employers to introduce such a scheme where previously none existed (Davies and Freedland, 1993: 217). As result, under the previous EqPA, the first provision was often the only route by which women could bring their equal pay claims. This situation was ameliorated by the amendment in 1983 which incorporated the concept of “equal pay for work of equal value” as a result of a ruling from the ECJ in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1982] IRLR 333. In this case, the United Kingdom was found in non-compliance with the EU Directive 75/117 of Equal Pay on grounds that the EqPA 1970 did not provide an adequate mechanism to enforce equal pay for men and women.

Taking into consideration the extent of occupational segregation between the sexes, finding a male comparator under the first provision is a common difficulty for both full-time and part-time women employees. However, part-time women employees are more likely than full-time women employees to be concentrated in so-called “women’s work” such as catering, cleaning, hairdressing and other personal

services (McDowell, 1989:168-169). It is, therefore, more difficult for part-time women employees to find a male employee who performs the same or broadly similar job to theirs since these are also performed only by other women. As a consequence, part-time women employees were less likely than full-time women employees to be able to bring cases under the EqPA. This means that the difficulty in finding a male comparator affects women in part-time employment more severely as long as the EqPA requires a real, not hypothetical, male comparator within the same employer (unlike the SDA which allows a hypothetical comparison).

The difficulty in finding a real male comparator for part-time women employees was highlighted in *ID Meeks v. National Union of Agricultural & Allied Workers* [1976] IRLR 198. In this case the applicant was a part-time secretary receiving a lower hourly rate of pay than her full-time female colleagues and brought her equal pay claim on the grounds that she was being subjected to sex discrimination since part-time employees were predominantly women. This particular case was lost without a decision on the main point of her case, that is that the less favourable treatment of part-time employees may constitute sexual discrimination because the majority of them are women. This is because the EqPA requires that a comparison be made with “a real male comparator”. As there were no men working in this particular context, this requirement could not be met and the case had to be dismissed.

The essence of the equal pay claim made by part-time women employees is their doing “like work with a man”, “work rated as equivalent with that of men” or “equal pay for work of equal value” within their working hours. This is a claim of

equality in value between part-time women employees and their full-time male counterparts in a unit of time. This clearly challenges the labour difference discourse in which the inferior value of part-time employees mainly because of their fewer working hours, is emphasised. However, the EqPA severely limits the possibility for part-time women employees to lodge a legal challenge on grounds of equality by requiring a real male comparator

Through this operation of the EqPA, the law creates double hierarchical divisions. First is that between men and women, in which, as MacKinnon points out, men are considered as the “standard” while women have to prove themselves as comparable to them (MacKinnon, 1987: 34). Second is that between women employees in terms of those who are and are not in a position to compare themselves with men. A group of women who can compare themselves with men is closer to the “standard” and therefore, superior to the other group of women who cannot do so. This division of women themselves affects both full-time and part-time women employees who cannot find male comparators. However, part-time women employees are more likely than full-time women employees to find themselves in the category of non-comparable employees because of their higher concentration in so-called “women’s work”.

The discriminatory practices in employment other than pay are covered by the Sexual Discrimination Act (SDA,) including dismissal and redundancy which are two of the most important issues covered under the SDA in relation to the part-time employment of women. Until very recently, trade unions often entered into

collective agreements which included a clause to make part-time employees (and, therefore, predominantly women) redundant before full-time employees. This treatment of part-time employees highlights the view held by many trade unions as well as employers of part-time employees primarily as women with families and being different from, and less worthy of protection than their full-time counterparts (Walby, 1986: 204-207). This trade unions' view of part-time employees corresponds to, and constituted, the labour difference discourse and was reflected in the less favourable treatment of part-time employees in collective agreements. This treatment was legally supported prior to 1986 since collective agreements were not explicitly covered by the SDA. This may indicate that up to the mid 1980s there was a double collaboration in producing and reproducing the hierarchical division of employees between trade unions and employers, and between them and the law. In addition, the SDA 1975 did not provide any provisions for such matters as internal work rules or rules governing the independent occupations and exempted private households or undertakings in which less than five workers were employed.

However, first, in *Clarke and Powell v. Eley (IMI Kynoch Ltd)* [1982] IRLR 131, the Industrial Tribunal (IT) made it clear that the collective agreements negotiated by trade unions could not justify the unfavourable treatment of part-time employees in redundancy, that is that they are being shed before full-time employees. Subsequently, the limited provision of equal treatment in the UK law attracted criticism from the European Commission and the matter was taken to the ECJ. It ruled in *the Commission of the European Communities v. United Kingdom and Northern Ireland* [1984] IRLR 29 that the narrow coverage of the SDA 1975 was

in breach of the EU Directive No.76/207. As a result of these cases, the SDA went through a major amendment in 1986, clarifying and extending its scope of coverage to the above mentioned matters.<sup>1</sup> Nevertheless, the above examination of legislation shows that the anti-discrimination Acts also differentiated full-time and part-time employees, facilitating the creation of a hierarchical division between them.

### *Adjudicative Differentiation*

While the creation of the hierarchical division between full-time and part-time employees was observed in the statutes, the adjudicative institutions utilised the labour difference discourse in order to legitimise this hierarchical division by emphasising the different and inferior value of part-time employees in comparison to that of full-time employees. Below, I will explore arguments put forward by the Industrial Tribunal (IT) and the Employment Appeal Tribunal (EAT) in an earlier case where part-time employees were differentiated typically on the basis of their shorter working hours. Then, I will move on to the exploration of the statement made by the House of Lords in a more recent case, which made a reference to the perception of part-time employees as being less committed workers than full-time employees. These are precisely the arguments which constitute the labour difference discourse.

In *Handley v. H. Mono Ltd.* [1978] IRLR 534, a part-time woman employee claimed equal pay with her male full-time counterparts, but the IT dismissed her claim. The decision was drawn from the following reasoning.

.....though she was at least as equally skilled as the man, she was contributing less overall not only to the production of the company but also to the utilisation of the company's equipment than somebody who worked 40 hours a week. ([1978]IRLR 534)

The IT did not consider that her lesser contribution would be reflected in the smaller total amount of wages she would have earned even if she had been paid at the same hourly rate. As a result, despite the fact that this particular part-time woman employee engaged in the same work during her working hours, the IT rejected her equal hourly rate claim only on the grounds of her shorter working hours.

The applicant appealed, arguing that the above ruling conflicted with Article 119 of the Treaty of Rome, by which the equivalent *pro rata* payment for the same job must be given. This argument was again rejected by the EAT for the reason that it could be considered that “*this was basically a different kind of job* in the quantitative sense (emphasis added)” ([1978] IRLR 534). Here it is clear that the IT and EAT considered a quantitative difference in time could amount to a qualitative difference in the kind of job despite there being no difference in the value and content of the work performed by the part-time employee and her male colleague during her working hours.

Moreover, the EAT speculated what would have been the decision of the ECJ had it considered this matter. It stated that



.....length of service is a factor which justifies a difference in pay. [.....] If length of service can justify such a difference, so can the number of hours which are worked in a week (Emphasis added). ([1978] IRLR 534)

The decision clearly shows that the IT and EAT considered part-time employment as being significantly different in value from full-time employment because of its shorter working hours. More importantly, they suggested no other reasons for proclaiming that it was appropriate to consider the same job performed by the part-time woman employee during her working hours as being “a different kind of job”, in other words, qualitatively different from that of her full-time male colleague.

Furthermore, in *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission* [1994] 2 WLR 409, the House of Lords suggested that the EPCA 1978 set a requirement of a minimum number of working hours to qualify for the key employment rights based on “the view that part-time workers were *less committed* than full-time workers to the undertaking which employed them (emphasis added)”([1994] 2 WLR 409, at 421. The case itself is analysed in detail in Section 4). Making this observation, the House of Lords did not offer any explanations why such a view was taken in the statutes, except their being part-time employees. This suggests that fewer working hours are taken to mean not only a quantitative difference in time but also a qualitative difference in the level of commitment brought to the job, suggesting that part-time employees are, therefore, less reliable, likely to produce poorer quality of work and are inferior to full-time employees. This argument constitutes the labour difference discourse in which part-

time employment is seen as both different and inferior in comparison with “standard” full-time employment.

The focus on working hours and commitment conceals the gender-specific organisation of part-time employment by emphasising differences based on labour-related characteristics. However, as was seen in Chapter 4, employers utilise the same language when they draw upon the labour difference discourse in the process of differentiating and treating part-time employees less favourably. At the same time, employers’ use of the labour difference discourse and of the gender difference discourse is intricately bound together since they see such labour-related differences as shorter working hours and lesser level of commitment of part-timers as deriving from the majority of them being women who are responsible for the family.

The legal arguments, on the other hand, do not engage in discussion of why it is predominantly women who enter part-time employment or why it is legitimate to consider that part-time employees are less committed to the work than full-time employees. Instead, the shorter working hours of part-time employees are presented as a gender-neutral ground to differentiate part-time from full-time employees. This suggests that the legal discourse of labour difference is deliberately separated from the gender difference discourse in constructing the hierarchical division of employees. This can be explained by the requirement of equal treatment of men and women under the law which does not allow the less favourable treatment of a group of employees based on their gender.

However, the evidence shows the proximity of the language which forms the labour difference discourse in the legal and employment institutions. For example, both legal and employers' labour difference discourses emphasise the "lack of commitment" of part-time employees. Through the discursive power of language, the legal discourse of labour difference interacts with that of employers which is bound together with the gender difference discourse. This means that even if the case appeared to be judged based upon gender-neutral labour-related grounds, such as the shorter working hours of part-time employees, the collaboration of discourses in and outside the legal institutions implies the gender-specific grounds. As result, the legal and managerial discourses can be seen as collaborating and reinforcing each other in constructing the hierarchical and gendered division of full-time and part-time employees.

To summarise, the differentiated treatment of part-time employees in the statutes and the labour difference discourse produced in adjudicative institutions have helped to create the hierarchical division between full-time and part-time employees. Through this hierarchical division, part-time employment was constructed as both quantitatively and qualitatively different from full-time employment and the less favourable treatment of part-time employees at the workplace was legitimised by the law in the 1970s. However, as demonstrated in the analysis of the labour difference discourse observed in the case discussed above, the qualitative differences of part-time employment were simply deduced from its shorter working hours rather than judged from the specific circumstance of individual cases. In this context, the adjudicative institutions did not make a substantive assessment of

whether or not work performed by a part-time woman employee was the same as, broadly similar to, or of equal value to, that carried out by her full-time male counterparts.

It can be argued that the less favourable treatment of part-time women employees is driven by the idea of formal equality based on the liberal legal tradition in which “like” should be treated as “like”. Certainly part-time employees work shorter hours than their full-time counterparts and in this particular point of the number of working hours, full-time and part-time employment is, indeed, different. However, as More argues, the legal principle of “like” as “like” is indeterminate since there is no specification of which aspects between the subjects should be examined to determine whether these are alike or different (1993: 58). Thus, while part-time employment can be constructed as different from full-time employment in terms of working hours, the legal principle of “like” does not specify that it should be the number of working hours which determines the difference between the two employment patterns. This means that it is law-makers and judges who selected working hours as a determining factor to emphasise the difference between part-time and full-time employment and elaborated this quantitative difference to qualitative differences.

On the other hand, if part-time employment is assessed by job-related characteristics, it can be shown that some part-time jobs are the same as or similar to those performed by their full-time counterparts. This was clearly the case for some part-time women employees in the hotel industry examined in this study (see

Chapter 4) and in the case discussed above (*Handley v. H. Mono Ltd*). This point is made here in order to suggest that the labour difference discourse produced in the law strongly reflected employers' discourse by selecting working hours as a criterion to measure the difference of part-time from full-time employment and to construct the hierarchy between these. Accepting the difference based on working hours, the law did not require employers to treat full-time and part-time employees equally and this has had benefits for employers.

### **3. The Gender Difference Discourse: Challenging the Hierarchy at Work**

With the advent of stronger pressure particularly from the EU to promote further sexual equality, the equal treatment of part-time employees has been sought under anti-discrimination legislation since the majority of them are women. This new approach has gendered part-time employment explicitly as women's by applying the principle of sexual equality to the situation of part-time employees and emphasising that women work part-time because of their gendered domestic position as wives and mothers. This has produced what I term the gender difference discourse which appears to have taken over the labour difference discourse produced in the statutes and earlier cases involving part-time employees in the British legal scene. Although this approach has brought improvement to the legal position of part-time women employees, it has failed to deconstruct the hierarchy of value between full-time and part-time employment created by the labour difference discourse. In consequence, this sexual equality approach has contributed to the gendering of the hierarchy of employees, that is that part-time employment is now explicitly gendered as women's while it is still considered as inferior to full-time employment.

In this section, first I examine a case related to equal pay brought in the early 1980s where signs of change from the labour difference discourse to the gender difference discourse can be observed. Then, I analyse the cases of indirect discrimination brought under the SDA and arguments raised amongst legal commentators concerning the decision given in one of these cases. The indirect discrimination cases are of particular relevance to this and the following section since these

indicate the gender difference discourse more clearly than those of equal pay claims. Finally, the re-constitution of women's gendered domestic position as wives and mothers who are responsible for caring for their families is identified in the EU legal context in order to reveal the limitation of the EU law in bringing about sexual equality, despite its appearance as a vehicle of change in Britain.

### *Linking Part-time Employment with Gender*

In *Jenkins v. Kingsgate (Clothing Productions) Ltd (no.2)* [1991] IRLR 388, a woman who was employed on a part-time basis receiving a lower hourly rate than a male full-time employee performing like work brought an equal pay claim. First the IT reached the conclusion that the differentiated pay between them was due to a "material difference", viz. that, as was argued by the company, it was necessary to pay a higher rate to full-time workers to discourage absenteeism since these workers kept the machinery continuously running in order to achieve higher productivity. This decision indicates a different approach taken by the IT from the one observed in *Handley v. H. Mono Ltd*, where the lower hourly rate of pay of a part-time woman employee was justified directly by the constructed difference and inferiority of part-time work based on their shorter working hours. On the other hand, *Jenkins v. Kingsgate (Clothing Productions) Ltd* attributed the lower hourly pay of the part-time woman employee to the existence of a "material factor", based on "economic reasons", which was, in this case, the necessity to achieve higher productivity.

On appeal the EAT referred the case to the ECJ which ruled that it would be discriminatory if “it is in reality merely an indirect way of reducing the level of pay of part-time workers, on the grounds that that group of workers is composed exclusively or predominantly of women” ([1981] IRLR 388 at 388). In this ECJ ruling a direct and clear linkage was made between the less favourable treatment of part-time employees in pay and sex discrimination, which had been obscured and hidden by the labour difference discourse previously. Receiving this ruling, the EAT remitted the case to the IT and subsequently the IT altered the initial decision in favour of the part-time woman employee. This case carried great significance since it established that being part-timers and, therefore, working shorter hours, does not automatically justify less favourable treatment.

It should be noted, however, that the above decision of the ECJ left open a question particularly in the current British economic climate, as the wording of the ruling itself was not clear with regard to how far it should be allowed to treat part-time women employees less favourably on economic grounds. The ruling seems to suggest that there could be cases where the pay differential between part-time and full-time workers could be justifiable even if all part-time employees involved are women. The ECJ gave such an example as follows.

..... where an employer is endeavouring on economic grounds which may be objectively justified to encourage full-time work irrespective of the sex of the workers. (*Jenkins v. Kingsgate (Clothing Productions) Ltd (no.2)* [1981] IRLR 388 at 389)



This is clearly at odds with the more recent policy of the EU which aims to achieve greater sexual equality by implementing pay on a *pro rata* basis between part-time and full-time employees.

Nevertheless, this case established that the lower rate of pay to part-time women employees may imply sex discrimination since the great majority of part-time employees are women. Employers are now required to demonstrate the existence of a “material difference” other than sex and part-timers’ status in order to pay part-time women employees less than their male full-time counterparts legally. “Material difference” is, therefore, the form of defence which would be used by employers in an equal pay claim and the establishment of this difference would justify the differentiated pay between full-time male and part-time women employees without this being considered as the outcome of sexual discrimination.

### *Highlighting the Gendered Domestic Position of Women*

While the differentiated treatment of part-time employees is increasingly seen as a matter of sexual discrimination, a particular emphasis has been placed on the reasons why so many women undertake part-time work rather than on the value of the work that part-time employees perform. Although the anti-discrimination approach undoubtedly has contributed to the improvement of the situation of part-time women employees in various aspects, a close examination of the legal arguments made within the framework of sexual equality shows that the idea of gender difference has been reintroduced into the case of part-time employment in a

way which may not be helpful to women. This is particularly so when indirect discrimination is alleged under the SDA 1975 and the Industrial Tribunals and courts highlight that fewer women than men are able to take full-time employment because of the gendered position of women as those who primarily carry domestic responsibility, as is illustrated in the cases examined below.

In *Clarke and Powell v. Eley (IMI) Kynoch Ltd* [1982] IRLR 131, two female part-time employees brought their cases under the SDA 1975. They were made redundant according to the redundancy selection procedure of the company which was agreed by the Transport and General Workers' Union (following a decision of a mass-meeting) and which was quite clear in declaring that part-timers should be made redundant before full-timers. In this instance 60 female part-time, 20 male full-time and 26 female full-time workers were dismissed. The applicants claimed that the company, in agreement with the trade union, imposed "a requirement or condition" of being employed on a full-time basis to avoid dismissal. However, this requirement can be complied with by fewer women than men as a result of circumstances outside the workplace and, therefore, their selection for redundancy amounted to unfair dismissal and is unlawful under the relevant provision in the SDA.

The IT ruled that one applicant, Miss Powell, could not have fulfilled the requirement to work full-time hours, stating that "the fact that she had a young daughter meant that at all material times she could not comply with that

requirement or condition (to work on a full-time basis)” ([1982] IRLR 131, at 132).

In coming to this view the IT stated that it was necessary

to look at ..... not whether the women can physically comply but whether taking into account *the usual behaviour of women* as observed in practice they can comply (Emphasis added). ([1982] IRLR 131)

This decision of the IT can be assessed positively since it accepts that to be full-time (in order not to be dismissed in this case) can be considered as a condition or requirement under the SDA and that child-care responsibility made it significantly more difficult for women to comply with the requirement or condition of being employed on a full-time basis. Therefore, in this case, Miss Powell, with a young child in need of care, was considered as being in a position where it was extremely difficult to work full-time. In doing so, the IT points out that this is “the usual behaviour of women” and reinforces gendered domestic position of women by privileging women who were carrying out expected women’s responsibilities, such as child-rearing while linking part-time employment with such women’s domestic responsibility.

On the other hand, the same IT decided that another application, Mrs. Clarke, who was a married woman with two children of 27 and 22 years old, could have fulfilled the requirement of being a full-time employee. Furthermore, Mrs. Clarke started to work in 1967 and, therefore, if she had been a full-time employee, she would have avoided dismissal before other full-time workers who faced redundancy carried out on a “last in, first out” principle. The judgement of the IT reads as following.

..... because of her domestic circumstances in the early years of her employment, Mrs. Clarke could not have complied with the full-time requirement but for the past six years she could have done so. Had she done so, she would not have been dismissed. She therefore failed in establishing her complaint of unlawful sex discrimination. ([1982] IRLR 131, at 133)

What this comment shows is that, to claim equal treatment as a part-timer, it is necessary to be a mother with small children. This means that the equal treatment of part-time women employees is not based upon their equal value to full-time employees but upon their sex and gendered domestic position.

Having finished child-rearing, Mrs. Clarke was regarded by the IT as a voluntary part-time worker who could have worked full-time hours because she did not have any dependent children any more, but preferred to stay part-time. The IT emphasises this point as follows.

Mrs. Clarke could have avoided dismissal by complying with the full-time requirement and ..... her failure to comply was a matter of *free and informed choice* (Emphasis added).

As discussed in Chapter 3, there are many commentators who point to women's choice in order to explain the growth of part-time employment amongst women and to legitimise their disadvantaged position as a matter of choice. In this case, the IT used this "women's freedom of choice" argument to justify the redundancy of a part-time woman employee in the post-child rearing period. However, in this particular case Mrs. Clarke had attempted unsuccessfully to obtain a full-time position three years before her redundancy by applying for promotion. Even though

the IT heard of Mrs. Clarke's unsuccessful attempt, it was still argued that her part-time employment had been a matter of "free and informed choice" and that she had maintained her part-time position longer than was necessary for her child-rearing.

This different treatment of Miss Powell and Mrs. Clarke also suggests that the idea of part-time being inferior to full-time employment has been maintained in the British legal scene. In the above case, the IT questioned the policy of making part-time employees redundant before full-time employees in terms of sexual equality but not in terms of equality between full-time and part-time employees. The IT made this point clear by allowing employers to dismiss part-timers, like Mrs. Clarke if they do not carry child-care responsibility at that moment, before full-timers, without questioning the appropriateness of this action.

The argument of free choice is the indispensable component for justifying this generally disadvantaged position of part-time employees. This is because, while part-time employment is constructed as different from and inferior to full-time employment, it is crucial to argue that part-time employees are not forced into but freely choose to be in that position. This demonstrates the importance of the concept of women's free choice to justify the differentiation of part-time employees. However, it should be emphasised that even when women do choose to work shorter hours, this does not mean that they also choose to be discriminated against. The discriminatory treatment is still the very source of many part-time women employees' dissatisfaction. As Frances O'Grady emphasises, "many part-time

workers do want to work part-time - but they don't want to be treated like second class citizens" (1995: 1)

The provision of indirect discrimination under the SDA certainly goes beyond formal equality which aims to treat men and women in the same manner, often taking men's way of working as standard. It is outlawed by the SDA to set requirements or conditions which are significantly more difficult for one of the sexes, mostly women, to meet, unless these are essential requirements to perform particular jobs. In the above case, being employed on a full-time basis is considered as a requirement or condition under the SDA and it is indicated that this requirement can be complied with by fewer women than men as a result of domestic circumstances, such as caring for children. This is the very approach which has played on the difference of women, taking women's different domestic position more into account in order to promote meaningful equality between men and women. Liff and Wajcman argue that this approach aims to grant "equal benefits to all regardless of difference" (1996:85). They claim that

This seems to be underpinned by a notion that differences which have been seen by employers as negating the demand for equal treatment in the past should no longer be an abandonment of the right to equivalent benefits. (Liff & Wajcman, 1996: 85)

Given this, being employed on a part-time basis should not be regarded as a reason to discriminate against part-time women employees. It can be argued that the IT in this case did not take the difference of women into consideration widely enough to

include such cases as Mrs. Clarke's. The IT failed to understand the effect of the disruption caused by child-rearing in her situation. By taking such a "break" from full-time employment, women often segregate themselves into a category which is widely considered as different from what is defined as a "standard" working pattern. Returning to full-time work from this other world is not necessarily easy, as Mrs. Clarke discovered.

This kind of gender specific argument was also repeated in *Home Office v. Holmes* [1985] 1 WLR 71. In this case, a woman civil servant who had been employed on a full-time basis by the Home Office requested that she be allowed to return to her work as a part-timer after the birth of her second child. This request was refused by the Home Office since part-timers were not employed on her grade. She took the Home Office to the IT on the grounds that their decision not to allow her to return to work on a part-time basis constituted unlawful indirect discrimination under the SDA. The IT and the EAT upheld her claim, pointing out that

..... despite the changes in the role of women in modern society, it is still a fact that the raising of children tends to place a greater burden upon them than it does upon men. ([1985] 1 WLR 71, at 74)

These arguments reintroduced the gender difference discourse in the legal context by drawing on the conventional idea of women as mothers while attributing to them a new role as part-time workers.

There is, however, one case where the EAT refused to assume automatically the linkage between women's domestic responsibility and undertaking part-time

employment. In *Kidd v. DRG (UK) Ltd* [1985] ICR 405, the IT and EAT dismissed the claim of indirect discrimination brought by a redundant part-time employee who was a married woman with two young children. Similarly to *Clarke and Powell v. Eley (IMI) Kynoch Ltd*, Mrs. Kidd was made redundant according to the agreed redundancy procedure between the company and the union. This selected part-time staff first for redundancy and then full-time staff based on the length of service. However, in this particular case, the entire workforce, including both full-timers and part-timers, consisted of women. It was, therefore, claimed that this procedure was discriminatory in two ways; based on sex as well as marital status “since women are less able than men, and married women less able than single women, to undertake full-time work” ([1985] ICR 405, at 406).

As discussed above, indirect discrimination is accepted by the adjudicative institutions when it is demonstrated that a particular group of the population - women or married women - has considerably more difficulty in fulfilling a requirement or condition than the other - men or unmarried women. The IT and the EAT decided that the relevant comparison in this case should be drawn not between men and women in the entire population, as was the case in *Clarke and Powell v. Eley (IMI) Kynoch Ltd* and *Home Office v. Holmes*. Instead, they allowed the comparison made amongst “those households in which there were young children requiring care to an extent potentially incompatible with the acceptance of full-time employment by anyone undertaking responsibility for providing it”. Examining these households, the EAT pointed out a considerable diversity, such as the traditional married two parent household, that of cohabiting unmarried parents and that of



single-parents, indicating that married women are not more disadvantaged than single women who are cohabiting or single parents.

Furthermore, the IT and the EAT emphasised that there are “married fathers (particularly amongst these who have been the victims of redundancy) who do not themselves work (or who undertake part-time work only) and whose wives go out to work full-time while they undertake the care of the children” ([1985] ICR 405, at 413-414). After exploring more the question of diversity, the EAT declared that

..... it would no longer be safe without evidential support to assume that a considerably greater proportion of women than of men, or of married than of unmarried women, regularly undertake a child-caring role precluding their acceptance of full-time employment. ([1985] ICR 405, at 408)

This conclusion unsurprisingly attracted much criticism (Byre, 1987; Morris and Nott, 1991; Palmer 1992) and Byre (1987) claimed that the subsequent Industrial Tribunals did not follow the approach taken in above *Kidd v. DRG (UK) Ltd* because

the decision [in Kidd] is somewhat *unique* and linked to the particular circumstances of the case - involving an all female rather than a mixed workforce where different considerations might apply. In the *Muir* case [one of the-subsequent cases cited], ..... the Tribunal adopted the “*common-sense*” view, as in other earlier cases .... that within society as it is presently structured, the main burden of responsibility for bringing up very small children lies or is accepted to lie on the mother (*Italics added*). (1987:33)

Palmer also strongly criticised the decision, emphasising that it is against empirical evidence as follows.

Kidd is arguably wrong. .... The view taken by the EAT in Ms Kidd's case is startling; it is not true that man take an equal role in child care and there is ample evidence to support this. (1992: 46)

The gender difference discourse has fundamentally changed the focus of legal arguments in Britain from one on labour difference to one which directly addresses the difference of women. The labour difference discourse certainly implied the difference of women in part-time employment, coupled with employers' discourse surrounding them. However, it emphasised at least at the superficial level, differences in gender-neutral labour-related factors, particularly the shorter working hours of part-timers, and it was this difference that legitimised the differentiated treatment of part-time employees in the law. On the other hand, the gender difference discourse highlights the difference of women in order to prevent employers treating part-time employees, the majority of whom are women, less favourably and to reward women who are currently fulfilling women's responsibility by rearing children. As observed in Byre's comment, women's responsibility for child-rearing even appears almost self-evidently to be drawn from "common-sense" and the decision against it is necessarily questioned and dismissed.

It should be noted that many criticisms directed at, and the subsequent isolation of, this decision has promoted the gender difference discourse in relation to part-time employment by focusing upon the structural fact that it is predominantly women who take child-care responsibility. As demonstrated in Chapter 3, it is indeed

largely women who undertake the responsibility of child-care and domestic work and there is a tendency for women with dependent children to take part-time employment in Britain. However, in the present study, this allocation of domestic work to women is seen as the result of the gendered construction of domestic positions of the sexes under unequal gender power relations, rather than something naturally determined or willingly chosen by men and women. In this context a concern should be raised about the recent legal strategy which is based upon gender difference, producing and reproducing the gendered domestic position of women as mothers. Morris and Nott (1991) underline this concern stating that “if a tribunal relies on ‘common sense’ in reaching a conclusion, it may run the risk of perpetuating traditional views of a woman’s role in society” (1991: 87).

Furthermore, there is an apparent irony in the strategy which links part-time work and the different domestic position of women. That is that part-time women employees are forced into the situation where they themselves have to emphasise their domestic position as “mothers” in order to win equal treatment with their full-time male “workers” in the workplace. By doing this, part-time employment itself is more clearly gendered as women’s, particularly for those who need to provide care for children at home while it is constructed as inferior to full-time employment on this basis. This means that the gender difference discourse of the sex equality approach reinforces the conventional identity of women as domestic carers while adding a new identity of women as secondary part-time workers to this. At the same time, this does not reconstruct part-time employment as a more gender-

neutral pattern of employment for which both men and women, and both married and single people, can opt.

### *EU Law: Sexual Equality Based on Difference*

As discussed above, the improvement of the position of part-time women employees based on sexual equality has been brought about under strong European influence through EU law and decisions from the European Court of Justice (ECJ). EU law showed great potential to alter the legal position of part-time women employees in Britain because of its more vigorous approach in implementing sexual equality in employment. Indeed, many cases discussed in this chapter were brought under Art. 119 and/or related Directives of the EU.

However, close analysis of the EU approach reveals clear limitations in its ability to improve the position of women. First, the promotion of sexual equality at work in the EU appears to be strongly motivated by economic considerations, that is, not to allow any member states to exploit unfair advantage of lower labour cost by paying women less than male workers. The EU is, therefore, relatively uninterested in promoting sexual equality as such outside the labour market and/or altering the sexual division of labour (Hoskyns, 1992: 22). Second and more important, the EU legal institutions also produce arguments which highlight the gendered domestic position of women as mothers and carers and, given the importance of EU law and decisions, this clearly promotes the gender difference discourse observed in the current legal scene in Britain.

Art. 119 of the Treaty of Rome is intended to promote non-discriminatory employment policy in the member states and focuses especially on the issue of pay.

It states that

Each member state shall ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

The next paragraph of the Article goes on to define what “pay” means in the first paragraph.

‘Pay’ means the ordinary basic or minimum wage or salary or any other consideration, whether in cash or in kind, which the workers receives, directly or indirectly, in respect of his employment from his employer. (Art. 119, Treaty of Rome)

The ECJ, to which responsibility for ruling on the proper interpretation of the Treaty and other Community laws was assigned by Art. 177 of the Treaty of Rome, suggested in *Defrenne v. Sabena* [1976] Case 43/75 Common Market Law Reports 98 that there were two aims to be extrapolated from Art.119 of the Treaty of Rome:

First in the light of the different stages of development of social legislation in the various member states, the aim of Article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay *suffer competitive disadvantage in intra-Community competition* as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay. Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same

time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their people. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community (Emphasis added). ([1976] Case 43/75 Common Market Law Reports 98, at 122)

The above statement suggests in the latter half that equal pay is not only an economic but also social objective which should be commonly pursued amongst the member states of the EU. However, it is unclear how this aim can be enforced in practice, particularly when member states do not comply promptly with EU law such as the Directives by amending their own legislation (Bridge, 1984). Moreover, the first half of the above statement clearly explains the importance of equal pay to the economic functioning of the Community, suggesting political concerns which entail the creation of a common market amongst member states, rather than the promotion of sexual equality *per se*.

This position can be seen clearly in *Hofmann v. Barmer Ersatzkasse* Case no. 184/83 [1984] ECR 3047 where the ECJ showed little interest in promoting equality outside the labour market. In this case, the compatibility of the German law with the EU Directive on Equal Treatment was disputed by a German father as maternity leave was provided only to women. Dismissing the claim brought by Mr. Hofmann, the ECJ argued that

*..... it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by*

preventing that relationship from being disturbed by the multiple burden which would result from the simultaneous pursuit of employment (Emphasis added). (Case no. 184/83 [1984] ECR 3047, at 3073)

It further revealed its view when Hofmann challenged the above decision arguing that the multiple burdens imposed on women would be lightened if fathers were allowed to take leave to care for their babies. The ECJ stated

[T]he Directive is not designed to settle questions concerned with the organisation of the family, or to alter the division of responsibility between parents. (Case no. 184/83 [1984] ECR 3047, at 3075)

Analysing this case, More (1993) criticises the ECJ decision as follows.

It [the ECJ] presented “the family” and “the workplace” as two unrelated spheres of life, refusing to recognise that women’s equality in the family may impinge their equality at work and, indeed vice-versa. (1993: 61)

However, this narrow conception of sexual equality is not surprising when considering the political aim of equal pay as discussed above, that is to prevent some states from gaining unfair competitiveness by negating this rule. In this context, there is little motivation for the EU institutions, including the ECJ, to attempt to change the unequal distribution of domestic work between the sexes *outside* the labour market. The above ECJ statement also relies heavily upon and contributes to the formation of the gender difference discourse, highlighting the idea that it is “natural” for women to take care of children by such wording as “the special relationship between a woman and her child”. This view of women as “natural” child-rearers had justified the denial of male workers’ parental leave while

providing it for women in the above case, and, more recently, supported the implementation of the EU Directive on Pregnant Women at Work (92/85/EEC).

The EU Directive on Pregnant Women at Work (92/85/EEC) was incorporated into the British domestic legislation in October 1994. Prior to this amendment, the right to maternity leave was subject to the qualification of weekly working hours and the length of continuous employment in Britain, similar to the rights to claim redundancy pay and unfair dismissal. Under the previous provision only those who worked 16 hours or more for a minimum of two years and those who worked between eight and 16 hours for five years or more were entitled to maternity leave of up to 40 weeks, 11 weeks before the expected week of childbirth and 29 weeks after childbirth. Those who worked less than eight hours were unable to claim any maternity leave.

The British Government implemented the above EU Directive by guaranteeing a 14 week universal maternity leave to all women employees irrespective of weekly working hours or the length of service. In addition, the superior maternity leave up to 40 weeks was retained for those who worked 16 hours or more for a minimum of two years or who worked between eight and 16 hours for five years or more. The subsequent removal of the working hours qualification in February 1995 has brought a superior maternity leave of up to 40 weeks to all those who are continuously employed for more than two years regardless of their weekly working hours (IDS Study 578, May 1993: 4).



Terming the approach taken in the EU as “the health and safety strategy”, Joanna Conaghan (1993) points out the benefits of this approach in the British context, which extended maternity leave to the formerly excluded group of women workers, particularly part-time employees, and stipulated protection against the dismissal of women on the grounds of pregnancy or related matters. At the same time, however, she displays her concern as follows.

..... the verdict on the new directive and its implementation [of new maternity provisions] must remain mixed. .... [it] carries a legacy of ideas and practices which, in viewing pregnancy primarily in terms of ill-health, weakness, and female vulnerability, may do more to disadvantage women than to assist them. (1993: 84)

This demonstrates that construction of the difference of women in the law in this area is closely associated with the notion of the inferiority of women to men in the labour market as well as in society. The gender difference discourse draws on this negative construction of women even though it has been used to ameliorate the legal position of women workers. Furthermore, gains made based on the gender difference discourse have made little impact in changing the existing structural inequality between the sexes and, indeed, reproduces the sexual division of labour and sexual segregation in the labour market reconstituting women primarily as mothers and carers and therefore as inferior workers.

In this section, I have identified the gender difference discourse in another set of arguments which were brought into the discussion of part-time employment in the British legal institutions by the sexual equality approach in the pursuit of more

substantive sexual equality under the influence of EU jurisdiction. The gender difference discourse operates in both British and European legal institutions to challenge the hierarchical division of full-time, part-time employees based upon the labour difference discourse and to improve the position of women employees. However, the danger of linking part-time employment with women's gendered domestic position and of highlighting the difference of women as biological or natural, should be clearly recognised, because of its effect in tying women into domestic sphere and a form of employment which remains undervalued and disadvantaged.

#### **4. The Gender Difference Discourse: Challenging the Hierarchy in Statute**

In this section, I focus on legal cases which can be seen as challenging the hierarchical differentiation of employees established in the EPCA based upon the labour difference discourse. As discussed earlier, the EPCA previously differentiated employees by both the number of working hours and the length of service when granting such rights as to claim unfair dismissal and redundancy pay. This less favourable treatment in the statute of part-time employees who worked less than 16 hours per week has contributed to the creation of, and been supported by, the labour difference discourse. While the difference has been constructed between employees who deserve protection and those who do not, the boundary set by the requirements of the EPCA between these groups of workers has been constantly shifting through various cases brought in the 1980s, and the legality of setting such statutory boundaries itself was challenged in a landmark case in the 1990s.

I first examine two cases brought by part-time women employees in the 1980s in order to show how working hours and continuous employment period requirements were tested and negotiated. The law has played a leading role in creating the fine lines of these hierarchical divisions amongst employees, demonstrating its ability to create the structural reality rather than simply reflecting it. However, the widely divergent decisions delivered by adjudicative institutions of the different levels in each case demonstrate the ambiguous and constructed nature of these legal boundaries amongst employees, which are very much subject to interpretation.

Then, I analyse *R. v. Secretary of State for Employment, ex parte the Equal Opportunities Commission* [1994] 2 WLR 409, which resulted in the amendment of the EPCA in 1995, removing the requirement of working hours. In this case, the legality of the statutory requirement of working hours itself has been challenged as discriminatory against women. I view this challenge initiated by the EOC, as an attempt to break down the statutory hierarchy of employees built upon the labour difference discourse by using the gender difference discourse. Although the case succeeded, the reliance upon the gender difference discourse has created the same problem as found in the cases discussed in Section Two. That is that it explicitly gendered part-time employment as women's without deconstructing the inferiority of part-time employees which is constructed on the basis of labour-related factors. In consequence, while preserving the hierarchical construction of full-time and part-time employment, the gender difference discourse brought by this case has highlighted the gendered identification of part-time employment, which had been hidden previously under the labour difference discourse. Here, the hierarchical as well as gendered construction of full-time and part-time employment is again reproduced in the legal institution.

### *Negotiating the Boundary*

After having gone through a few changes, the qualifying thresholds for the rights to claim unfair dismissal and to claim redundancy pay were set prior to the amendments in the 1990s as follows: a) weekly working hours of 16 or more *and* continuous employment period of two years or more; or b) weekly working hours

of between eight and 16 hours *and* continuous employment period of five years and more. The main arguments in the following two cases are related to the interpretation of these rules - whether or not it is permissible to aggregate the weekly working hours and the period of employment necessary before claiming the above statutory rights. Although issues discussed in these cases may appear highly technical and narrowly concerned with such matters as the precise method of the calculation of hours, this technicality shows that the division of employees has been created artificially by the law.

In *Ford v. Warwickshire County Council* [1983] IRLR 126, a female part-time teacher brought a claim of unfair dismissal and redundancy payments under the previous EPCA. She was employed for eight years as a part-time teacher at a college of Warwickshire County Council but her contracts started in September and terminated in the following July. Under these contracts technically she was not employed by the County Council during the summer holidays. As the EPCA requires a minimum of two years' continuous period of employment to claim unfair dismissal and redundancy payment, the argument focused on the issue of whether her employment could be seen as a single continuous contract or eight separate yearly contracts.

Originally, the IT dismissed the applicant's claim on the grounds that she did not fulfil the requirement of continuous employment of two years with the County Council. The claimant appealed arguing that she was not unemployed but "absent from work on account of a temporary cessation of work" as described under para. 9

(1) (b) of Schedule 13 to the EPCA during the summer holidays. Her employment, therefore, was not separated by the breaks of the summer holidays but could be presumed to be continuous. However, this argument was rejected by the EAT.

The case went to the Court of Appeal which supported the decision made in the EAT. It ruled that the appellant “was not absent from work on account of cessation of the classes which she taught, but on account of the expiry of her contract to teach them”. The court pointed out that workers with a fixed term contract are unemployed at the end of the term because para. 9 (1) (b) was intended to “give protections only against the loss of an employee’s rights and remedies by an interruption in the continuity of his work of a kind which he did not anticipate and was not responsible for, not an interruption that he had anticipated and agreed to” ([1983] IRLR, 126, at 126). Here the Court of Appeal assumes that, if workers take fixed-term contracts, they are informed that a break will happen in their employment and agree to it as a condition of their contracts, thereby putting themselves outside the protection of the EPCA.

However, the decision was reversed on appeal to the House of Lords. The House of Lords in its ruling focused, as did the lower bodies, on an interpretation of the words “absent from work on account of a temporary cessation of work” in para. 9 (1) (b) of Schedule 13 to the EPCA. In contrast, it ruled that the employee is in a “transient” position between contracts, which can be considered as an interval meant by the term of “a temporary cessation of work” in para. 9 (1) (b) of Schedule 13 to the EPCA. The House of Lords took the view, therefore, that the Court of

Appeal had been wrong in ruling that the appellant did not have a sufficiently long continuous period of service to be eligible for protection under the EPCA.

This ruling can be seen as having established a position which seemed to be in favour of part-time employees under fixed term contracts. However, Lord Diplock remarked *obiter dicta* that, due to the wide variety of contracts under which part-timers are employed and the variation in the gaps between contracts in each case, this decision might not apply in every case. He also referred to other types of employment where conditions might suggest a different outcome, such as hotel work where the gap may be too long to permit an interpretation of it as a transient cessation of work. This opinion introduced a note of complexity and a grey area of discretion to be exercised by the Industrial Tribunals and courts when considering the fulfilment of requirements. This shows that while the law invents boundaries, the fine details of these lines are not firmly fixed but are open to negotiation, and soon the gray area indicated in this case was tested in a subsequent case.

In *Lewis v. Surrey County Council* [1986] IRLR 11, 455; [1987] IRLR 509, a teacher was employed by Surrey County Council in three college departments under three separate and independent contracts on a term-by-term basis for 14 years. None of these on its own fulfilled the required working hours per week or the length of employment in order for Mrs. Lewis to qualify for the statutory rights set out in the EPCA to claim unfair dismissal and/or a redundancy payment. To be able to meet these conditions, it would be necessary for her to aggregate working hours and termly contracts in all three departments.

Referring to the decision made by the House of Lords in *Ford v Warwickshire County Council*, the IT ruled that the amalgamation of both hours and terms was “permissible as a matter of industrial good sense” ([1986] IRLR 11). However, on appeal, the EAT ruled that the part-time teacher did not meet either requirements of working hours or continuous employment and overturned the decision delivered by the IT. The EAT argued that “the IT had been misled by the superficial similarity between the circumstances of the present case and those in *Ford*” ([1986] IRLR 11 at 11-12). This is because the House of Lords did not decide in *Ford v Warwickshire County Council* that it was generally acceptable to aggregate weekly working hours or the period of employment under the different contracts in order to make up the necessary criteria of working hours and/or the length of employment.

The case was then referred to the Court of Appeal which restored the original decision of the IT. The Court of Appeal ruled that

..... the Industrial Tribunal was entitled in law to aggregate the hours of work which the appellant’s various contracts with the respondents normally involved per week for the purpose of determining whether her contractual relations with the employer involved employment for at least eight hours a week. ([1986] IRLR 455 at 455)

The legal argument of the Court of Appeal in reaching the above ruling was that “employment means employment under a contract or contracts of employment” ([1986] IRLR 455 at 456) in interpreting the wording of the EPCA. This approach was based on the Interpretation Act 1978 which states that, unless otherwise specified singular words in an Act “include the plural”. Moreover, the Court of



Appeal accepted the claim that her employment was not divided by the intervals between the terms so that the five years continuous service required by the Act was met, according to the principle established in the above *Ford v. Warwickshire County Council* as regards the relative brevity or otherwise of gaps between contracts.

This decision was again overturned by the House of Lords which restored the decision of the EAT. First, the House of Lords rejected the aggregation of working hours under the EPCA insisting that “the total absence of any reference to aggregation provides the clearest indication that aggregation is not permissible” ([1987] IRLR 509 at 510). Secondly, the House of Lords also insisted that in this case the contracts of the part-time teacher were “sequential and separate”, which is distinct from “successor and predecessor contracts in the same series” ([1987] IRLR 509 at 510) which would be allowed to be seen as continuous employment. The obvious difficulty of this approach is that no definition of this distinction was offered and, therefore, there is no clear indicator which can be applied elsewhere. This means that the gap left in one case must be filled by another set of legal agreements in other test cases, producing again the fine details of boundaries of divisions amongst employees.

### *Challenging the Statute as Discriminatory*

The EOC mounted a legal challenge over the very imposition of these legal requirements in *R. v. Secretary of State for Employment, ex parte Equal*

*Opportunities Commission* [1994] 2 WLR 409. It first urged the Secretary of State for Employment to reconsider the threshold requirements in the EPCA and the method of calculation of redundancy pay, arguing that these adversely affect more women than men and are, therefore, incompatible with the EU law. However, the Secretary of State for Employment dismissed both points raised by the EOC and made it clear that he did not have any intention of altering the qualifying requirements. The Secretary of State responded to the EOC in writing:

.....we believe that our current statutory thresholds are entirely justifiable.

These thresholds have existed in one form or another ever since employment protection legislation was first introduced. *Their purpose is to ensure that a fair balance is struck between the interests of employers and employees.*

We have no plans to change the thresholds (Emphasis added). ([1994] 2 WLR 409, at 415)

What this statement suggests is that it is unfair to employers if the legislation requires them to treat all employees equally irrespective of their difference in working hours because some part-time employees are different and inferior to full-time employees. This is the reliance upon the labour difference discourse.

After receiving the letter from the Secretary of State for Employment, the EOC made two applications for judicial review against his refusal to reconsider statutory qualifying criteria and the calculation method of redundancy payment. Judicial review is the procedure by which the court can give prerogative and other remedies against the decisions of inferior courts and tribunals, and executive actions of government (for the detail of the procedure of judicial review, see Ingman, 1994:

Chapter 11). This became a landmark case, the final decision on which was delivered from the House of Lords and the amendment was made accordingly to the EPCA, removing the working hour requirement in February 1995.

In the first application, the EOC argued that the provisions in the EPCA which treated part-time employees less favourably than full-time employees amounted to indirect sex discrimination because approximately 87 per cent of part-time employees in the United Kingdom were women. The requirements specified in the EPCA, therefore, were inconsistent with the EU law (the Council Directive 75/117/EEC and the Council Directive 76/207/EEC). In putting forward this argument, the EOC highlights the gendered organisation of part-time employment, demonstrating this by bringing a joint applicant who was a part-time woman cleaner employed by Hertfordshire County Council. She worked for 11 hours per week and was made redundant after a little less than five years, leaving her no right to claim unfair dismissal or redundancy payment.

The second application is concerned with the method of calculating statutory redundancy pay which is carried out under a scheme based on the pay of an employee at the time they are made redundant. Because of this, employees who are dismissed after their transfer from full-time to part-time work are not given any credit for the higher pay during their previous full-time employment. It is largely women who are disadvantaged by this method of calculation since they form the majority of workers who alter their position from full-time to part-time. The EOC argued that:

This means that the higher pay received by an employee working full-time is not taken into account if that employee is subsequently transferred to part-time employment prior to the calculation period. ([1991]IRLR 493, at 493)

In these arguments the EOC draws upon the gender difference discourse by suggesting that more women work part-time or are transferred from full-time to part-time employment due to their differing domestic position from men. Here a conflict can be observed between the labour difference discourse which appears in the above statement made by the Secretary of State, and the gender difference discourse supported by the EOC.

At the first stage in the Divisional Court, justifying the qualifying requirements, the Secretary of State argued that:

..... if and in so far as the relevant provisions have the effect of indirectly discriminating against women, they are objectively justified. [...] ... legislation to dispense with the qualifying thresholds *would lead to a reduction in part-time jobs available to those who want them.* (Emphasis added) ([1991] IRLR 493 at pp.493-494)

Accepting the argument, the Divisional Court dismissed the first application and ruled that:

..... the fact that part-time employees do not have the same rights in relation to redundancy payments and unfair dismissal would appear, at the lowest, to be counterweight to the increased administrative and cost burden imposed on employers of part-time employees. .... it was not unreasonable for the Secretary of State to conclude that amendments to the legislation might

have adverse consequences for women seeking part-time employment.

([1991] IRLR 493 at 494)

The Divisional Court also dismissed the second application although it admitted that the method could be discriminatory against women. It ruled that this method, however, could also be objectively justified because it would lead to greater administrative costs to employers if the present scheme, which is “clear, direct and simple” ([1991] IRLR 493 at 494), needed to be altered. It concluded that:

Administrative complexity and cost to employers and the consequences for employment arrangements generally are factors which the Secretary of State is entitled to consider when proposals to change the present scheme are put forward. ([1991] IRLR 493 at 494)

As seen in the above statements, the Secretary of State and the court supported the reduction of the operational cost, which is achieved by the reduction of legal protections offered to some part-time employees. Moreover, they insisted that this was justifiable, that is that the less favourable statutory treatment of some part-time employees was in reality to the advantage of women themselves since the heavier burden of operational cost might discourage employers from creating more of this type of employment or, even worse, persuade them to let these employees go. However, as pointed out in the decision of the House of Lords below, there is no concrete evidence that employers stop creating and/or using part-time employment if part-timers are granted the same employment rights as their full-time counterparts.

The above arguments, nevertheless, create an impression that part-time employees are much more dispensable than full-time employees, again connotatively indicating the assumed lesser value of part-timers to business. This suggests the formation of, and the reliance upon, the labour difference discourse in the above statements. The result of this hierarchical construction of part-time employment is that the interests of employers and employees are weighted in employers' favour at the expense of women who consist of the great majority of part-time employees. Moreover, given that the Court had acknowledged that the present scheme effectively discriminated against women, this implies that the Secretary of State was within his discretion to countenance the continuation of such discrimination if he believed it to be in the interests of "wider economic and employment objectives".

The EOC appealed. However, the Court of Appeal also dismissed both applications. Finally, the first application concerning the legality of the qualifying requirements of the EPCA was brought to the House of Lords. Prior to the substantive discussion, the capability and propriety of the EOC to bring the case for judicial review were questioned by the Secretary of the State. After clearing up these procedural points in favour of the EOC, the House of Lords concluded that the provisions of the EPCA 1978 regarding both redundancy pay and unfair dismissal were indeed "incompatible with Article 119 of the EEC Treaty and the Council Directive of 10 February 1975(75/117/EEC)" and "with the Council Directive of 9 February 1976 (76/207/EEC)" respectively ([1994] 2 WLR 409, at 423).

Reaching the above conclusion, Lord Keith of Kinkel offered a detailed explanation which deserves close attention as it is of great relevance to this study. First, he considered “the original reason for the threshold provisions of the Act of 1978” as being based on “the view that *part-time workers were less committed than full-time workers* to the undertaking which employed them (emphasis added)” ([1994] 2 WLR 409, at 421). This statement indicates that the qualifying thresholds of the EPCA 1978 had been built upon the labour difference discourse which constructs part-time employees as less committed and, therefore, inferior workers. Lord Keith of Kinkel rejected this view alongside the claim made by the Secretary of State of the necessity of striking “a fair balance between the interests of employees and employers”. He stated that these grounds cannot be considered as objective justifications for setting the thresholds to claim unfair dismissal and redundancy pay under the more recent circumstance ([1994] 2 WLR 409, at 421).

While the construction of part-time employees as less committed workers is still widely prevalent amongst employers, as discussed in Chapter 4, this is no longer considered by the Lords as sufficient grounds to justify the differentiated statutory treatment of part-time employees. However, the main motivation of this change seems to be driven not from any major reconstruction of the perception of part-time employees, that is, to one which suggests part-time employees are as much committed to their work as their full-time employees. Rather, the change was brought about by the anti-discrimination approach. This means that equality is granted to part-time employees based on their differing position as women, effectively shelving the question of whether part-time employees are substantively

different from full-time employees in terms of their value and contribution to business.

Lord Keith of Kinkel also rejected another contention made by the Secretary of State, which was that “the thresholds have the effect that more part-time employment is available than would be the case if employers were liable for redundancy pay and compensation for unfair dismissal to employees who worked for less than eight hours a week or between eight and 16 hours a week for under five years” ([1994]) 2 WLR 409, at 421). Although he regarded that “(t)he bringing about of an increase in the availability of part-time work is properly to be regarded as a beneficial social policy aim”, Lord Keith of Kinkel questioned the suitability of the adopted method to achieve this aim, that is, by treating these who worked less than 16 hours per week less favourably than those who worked more than 16.

Having considered a case where paying part-time employees a lower rate than their full-time counterparts might be justified, Lord Keith of Kinkel decided that this “would be a special and limited state of affairs” and, then reached the conclusion that the denial of rights to claim redundancy pay and compensation for unfair dismissal is in breach of the equal pay principle. He states:

..... considering that *the great majority of part-time workers are women* would surely constitute *a gross breach of the equal pay* and could not be possibly be regarded as a suitable means of achieving an increase in part-time employment (Emphases added).



In this argument the debate about whether part-timers are in reality less committed workers than full-timers seems to be of little relevance since the main reason which is given for not treating part-time employees less favourably is that “the great majority of (part-time) workers are women”.

Although there was no direct speculation why this was the case by Lord Keith, it can be easily linked with the arguments of the difference of women based upon their gendered domestic position, which is central to the gender difference discourse. It should be emphasised that the gender difference discourse obscures the core understanding of equal pay, that is that a part-time woman employee’s entitlement to equal pay is attributed to her performing work which is the same as, similar to, or of equal value to that performed by her full-time male counterparts in a particular workplace rather than to her being a woman *per se*. There is no doubt that this decision produced a great improvement in the legal position of part-time employees who were previously treated less favourably in such important matters as redundancy pay and unfair dismissal. However, this gain was achieved by reinforcing the difference of women rather than the equal value of part-time to full-time employees.<sup>2</sup>

## **Conclusion**

This chapter demonstrated how, in the British legal scene, the focus of arguments surrounding part-time employment have shifted from the labour difference discourse to the gender difference discourse in the course of the last three decades. This change was brought about under EU influence, initiated by the promotion of sexual equality. Under this sexual equality approach, first the less favourable treatment of part-time women employees by employers was challenged in the Industrial Tribunals and courts, and then the statutory differentiation of employees was charged as being discriminatory. Through this development, the legal position of part-time women employees in Britain has improved considerably and this attained its zenith when the House of Lords delivered the decision to remove the qualification of working hours for the EPCA 1978 in 1995.

The legal gain was, however, achieved by the redeployment of the gender difference discourse in the following problematic context. First, the substantive assessment of the value of part-time employees in comparison to their full-time counterparts, which would have offered an opportunity to deconstruct the labour difference discourse, was effectively shelved by the advent of the gender difference discourse. This means that the view of part-time employees as inferior to full-time employees was never seriously challenged or altered and, in consequence, is maintained. Second, although the gender difference discourse was brought by part-time women employees and the EOC to the legal institutions in order to improve the situation of women in part-time employment (in contrast to its use by employers in employment

institutions) in practice, it reinforced a conventional view of women as mothers and care-providers (as indeed it did in employment institutions). Third, in doing so, the gender difference discourse explicitly gendered part-time employment as women's, linking it with the specific position of women in the family.

Thus, the law, through its discursive and institutional power, contributed to the shaping and reshaping of the hierarchical and gendered construction of full-time and part-time employment. The effect of this construction of part-time employment was to consolidate and reinforce the conventional identity of women as mothers and lock women into the marginal segment of the labour market as part-timers. This means that women's subjectivity is reshaped through the legal discourse as mothers and carers as well as part-time, that is inferior, paid workers. This helps to maintain the sexual division of labour, that is the allocation of domestic work to women, and sexual segregation in the labour market, that is the allocation of women to part-time employment which is constructed as inferior, in British society.

Next, I proceed to the examination of the Japanese legal scene, focusing upon how the labour difference discourse and the gender difference discourse operate in a very different context from Britain to construct *pato* as inferior to formal employment.

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<sup>1</sup> At the same time the government removed protection granted to women workers under the Factories Act 1961 concerning the restriction of such matters as shift work, overtime and maximum working hours under the name of equal treatment. Kathy Sutton criticised this move as a general deterioration of conditions, arguing that sexual equality should not be achieved by levelling down (1989: 6). The logic behind this is that equality cannot be achieved while women are given special protection by the law. Although it is necessary to review legal protection for both men and women workers in accordance with changing circumstances, simply abolishing protection and introducing the same treatment of both sexes is something many fear will create further inequality between the sexes in society.

<sup>2</sup> While the qualification of working hours was removed as the result of the case discussed above, increasing attention is now paid to the other requirement of continuous employment. A case is expected to be referred to the House of Lords, which may clarify whether or not the requirement of a continuous period of employment has been in breach of the EU Equal Treatment Directive and, therefore, must be removed. (see *R. v. Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1995] IRLR 464).

## CHAPTER 6: *PATO* EMPLOYMENT IN JAPANESE LEGAL INSTITUTIONS

### Introduction

In this chapter, I analyse discourses surrounding *pato* employment in the Japanese legal institutions, particularly focusing upon the reshaping of the hierarchy of employees by the courts and the introduction of the Law on Part-time Employees (PEL) in 1993.

As is the case in British and Japanese employment institutions and the British legal institutions, both labour difference and gender difference discourses can be identified in relation to *pato* employment in the Japanese legal institutions. However, the labour difference discourse has been dominant under the post-war legal framework set out by the main piece of labour-related legislation, the Labour Standard Law (LSL) 1947. Through the operation of the labour difference discourse, the hierarchy of employees has been produced in the law based upon the constructed inferior value of *pato* to formal employees in terms of apparently gender-neutral labour-related factors.

The construction of the hierarchy of employees has taken place mainly in the courts in Japan since the LSL itself does not differentiate between employees directly in terms of granting rights to them. On the other hand, the courts have differentiated *pato* from formal employees in individual cases, constituting the less favourable

treatment of *pato* employees as a lawful differentiation based upon their differing contractual employment status which, in the view of the courts, reflects the qualitative inferiority of *pato* employees. In doing so, the courts carefully avoid direct reference to gender since the principle of sexual equality under the law operates in the Japanese legal regime as it does in Britain. I will analyse this differentiation of employees based upon the contractual employment status as constituting a part of the labour difference discourse in the Japanese legal institutions since the courts see the allocation of the less favourable contract to *pato* employees as reflecting the different and inferior quality of these employees (see the cases of redundancy discussed in Section 2 of this chapter).

On the other hand, in the Japanese legal institutions, unlike in those in Britain, there has been no move to apply the anti-discrimination legislation to the situation of *pato* employees, despite the fact that the great majority of these are women. Instead, a new piece of legislation, the Law on Part-time Employees (PEL) was introduced in 1993, which purportedly aimed to improve the situation of *pato* employees. It is, however, of no practical use for bridging the gap between formal and *pato* employees since there are no compulsory requirements with which employers must comply. Despite that, the introduction of the PEL brought about an important change to the legal construction of *pato* employment in Japan. The PEL redefines *pato* employment as an employment pattern of shorter working hours rather than that based upon contractual employment status and, in doing so, excludes disguised *pato* employees from the general category of *pato* employees. Having redefined

*pato* employment in this way, the PEL underlines the difference of *pato* employees on the grounds of their shorter working hours.

At the same time, a close examination of the wording of the PEL suggests an implicit recognition of the gender-specificity of *pato* employment, which contributes to the gendering of this pattern of employment as women's. Moreover, debates held in the law-making body and other public fora at the time of the introduction of the PEL have exposed the gender difference discourse which was hidden until then under the labour difference discourse. Although the gender difference discourse does not appear directly in the LSL and judgements of adjudicative institutions, the way in which PEL was made and arguments generated for its introduction have highlighted the importance of gender in the formation of *pato* employment, suggesting that the differentiation of *pato* employees is indeed gendered.

What I argue here is that the PEL can be seen as an attempt to reshape the hierarchy of employees through the discursive power of the law by shifting the grounds of the construction of the inferiority of *pato* employees from contractual employment status to the shorter working hours of these employees. The advantage of this operation is to give lesser emphasis to management discretion to offer different contracts to different groups of workers. Although employers claim that this simply reflects the different quality of employees, the assigning of different contracts can be seen more readily as discriminatory than the differentiation of employees based upon working hours. However, this is a shift from one element (contract) to another (working hours) within the labour difference discourse, and

therefore, I will consider this shift as a reshaping and reinforcement of the hierarchical differentiation of formal and *pato* employees based upon the labour difference discourse in the Japanese legal scene. While highlighting the different and inferior quality of *pato* employees, the PEL also helped to introduce the gender difference discourse in the debates of *pato* employment. This means that the PEL has strengthened the hierarchical division of *pato* and formal employees, adopting both labour difference and gender difference discourses.

This chapter is divided into four sections. Section 1 describes the general legal context and the relevant sections of statutes, the Labour Standard Law (LSL), the Equal Employment Opportunity Law (EEOL) and the Law on Part-time Employees (PEL), in relation to the *pato* employment of women. Following this, in Section 2, I demonstrate the hierarchy of employees created in the legal regime by examining the LSL and decisions delivered by the court in cases of the equal pay and redundancy of *pato* women employees. The LSL covers both *pato* as well as formal employment, guaranteeing basic employment rights and protections such as those to claim redundancy pay and to claim unfair dismissal, to all employees irrespective of the number of working hours and/or their length of service. However, the hierarchical differentiation of employees can be observed in the lack of provision for *pato* employees to claim equal treatment to formal employees under the LSL and in the labour difference discourse which appears in the court, in the form of the argument of differences in contractual employment status based upon the supposed inferior quality of *pato* employees.



In Section 3, I examine the process in which the hierarchical division of employees is restructured and reinforced by the PEL through the operation of the labour difference discourse based upon the shorter working hours of *pato* employees. In the early 1990s, the Japanese Government was put under pressure to take action to improve the working conditions of *pato* employees because of the growing international and domestic concern over the disadvantaged position of women in part-time/*pato* employment. In response to these pressures the Law on Part-time Employees (PEL) was introduced in 1993 with the new definition of these employees. I first examine this definition of *pato* employees given in the PEL based upon the criterion of working hours, focusing upon the exclusion of disguised *pato* from its coverage. The denial of equal treatment between formal and *pato* employees based upon the labour difference discourse is then discussed in relation to the wording of the PEL and the way in which the difference and inferiority of these *pato* employees was constructed through discussions held in legislative and other public fora. I argue that the exclusion of disguised *pato* employees from the general category of *pato* employees through the new definition provided by the PEL is a legal discursive construction since widely prevailing management practice includes both disguised and genuine *pato* workers (see Chapters 3 and 4). The effect of this new definition of *pato* employees is to facilitate the adoption of the labour difference discourse which highlights the different and inferior value of *pato* as compared to formal employees on the grounds of their shorter working hours.

In Section 4, I analyse sections of the PEL which suggest the gender-specificity of this legislation and also the gender difference discourse found in the debates

generated at the time of the introduction of the PEL in legislative and public fora. In the process of the passage of the PEL, the gender difference discourse was underlined in a set of arguments in which the gendered domestic position of women as mothers and wives was emphasised. The gender difference discourse was brought into the discussion of *pato* employment in Japan in a way which *complemented* the labour difference discourse by incorporating gender within the hierarchy of employees. This is a marked difference from the British legal context where the gender difference discourse was reintroduced under the sexual equality approach in a way to challenge the hierarchy of employees created by the labour difference discourse.

In the Japanese legal scene, I argue, the effect of the labour difference discourse has been to construct *pato* employment as inferior while the gender difference discourse supports this construction of *pato* employment. Moreover, the argument of women's choice is a particularly important component of the gender difference discourse in Japan since it creates an impression that the concentration of women with families in this inferior pattern of employment is not discrimination against them, but a result of women themselves choosing to participate in this particular pattern of employment, often after a career break for raising family. However, it is difficult for women to return to the labour market as formal employees under the current employment system and the sharp division of labour at home. As a result, *pato* work can be the only option for many women to re-enter the labour market. This means that the law contributes to the creation and maintenance of the system under which a large number of women are exploited as *pato* employees at work

while taking domestic responsibility, by privileging formal employment which is reserved largely for men.

## 1. Analytical Method and Legal Materials

The analytical method described in Chapters 1 and 5 is also adopted to examine legal materials in Japan since the aim of this chapter is also to identify and analyse the labour difference discourse and the gender difference discourse in relation to *pato* employment in the Japanese legal context. Evidence used in this chapter consists of the relevant legislation, an interview with *ex-pato* women employees, and debates held in legislative and public fora at the time of the introduction of the PEL 1993. I conducted an interview in 1994 with five *ex-pato* women workers involved in a legal dispute over equal pay with their ex-employers in order to collect data about their case. The interview with these women is used as part of my evidence since there have been very few cases of *pato* women employees involved in equal pay claims as these women are. The analysis given below of their situation is based on the interview and their written complaint to the court. The debates held in legislative and other public fora (a discussion meeting organised by a leading law journal), are also examined in order to expose the underlined gender difference discourse which does not appear directly in the content of legislation and arguments in adjudicative institutions.

The following sections of this chapter analyse actual legal discourses in specific sections of each piece of legislation in relation to the labour difference discourse (Sections 2 and 3) and the gender difference discourse (Section 4). Section 2 examines the LSL, focusing upon the provision of the prohibition of discriminatory treatment of workers and equal pay, its inability to offer any legal remedy to *pato*

women employees in this area, and the differentiation of *pato* from formal employees observed in redundancy cases. Section 3 then focuses upon sections of the PEL which are relevant to the labour difference discourse while Section 4 examines other sections of the PEL related to the gender difference discourse. In order to set subsequent arguments of this chapter in context, this section describes briefly below the legal system in Japan as well as the content of the legislation most relevant to the *pato* employment of women, the Labour Standard Law (LSL) 1947, the Law on Equal Employment Opportunity (EEOL) 1985, and the Law on Part-time Employment (PEL) 1993. (For comprehensive account of the employment law in Japan, see Hanami, 1985; Hashizume, 1992; Oda, 1992; Sugeno, 1994).

#### The Labour Standard Law (LSL) and

#### the Equal Employment Opportunity Law (EEOL)

After the end of the Second World War and during the period of occupation (1945-1952), the Supreme Commander of the Allied Powers made various legal reforms. The most important reform of all was to promulgate the new Constitution of Japan in 1947, which is still in place today. It requires the setting of minimum standards of working conditions by the law, including such matters as wages, working hours and holidays (Art.27-2). Following this constitutional requirement, the broad legal framework for the protection of workers was implemented by other laws such as the LSL 1947, the Labour Union Law 1949 and the Minimum Wages Law (MWL)<sup>1</sup> 1959 (for the legal reform in the area of labour law in post-war Japan, see William, 1984).

Since its introduction, the LSL has been the main piece of legislation which governs individual employment relations. First, it provides a so-called “floor of rights” for all employees as the EPCA 1978 in Britain is intended to do. As such, it provides in theory fundamental rights and protections for all employees, including both men and women employees as well as both formal and *pato* employees. It should be noted that the LSL, unlike the EPCA, sets no conditions or requirements for employees to qualify for the various rights, such as the right to claim redundancy pay (which must be equivalent to no less than 30 day wages) and the right to bring a complaint when unfair dismissal takes place. Particularly important to all women employees, the LSL also provides protections for pregnant workers and the right to maternity leave.<sup>2</sup> This means that in theory *pato* employees have the same rights as formal employees and are not differentiated from them in terms of access to these employment rights and protections offered by the LSL.

Secondly, the LSL lays down the principle of the equal treatment of workers irrespective of “nationality”, “creed”, or “social status” (Art. 3) and, in a separate clause, it prohibits sex discrimination in regards to pay only (Art. 4). In *Fuji-Jukogyo* Case [1965] Rodo-kankei-minji-saiban-reishu 16/2/256 (The Labour-related Civil Case Reports vol. 16, no.2 p.256, hereafter referred to as Romin), the court decided that “social status” in Art. 3 of the LSL does not include employment status which is determined by employment contract. At the same time, Art. 4 of the LSL set outs the principle of equal pay between the sexes which prohibits direct discrimination on the basis of the employees concerned, covering equal pay for the “same” work only (see Section 2).

It should be noted that discriminatory treatment of women workers other than in pay is dealt with by the Equal Employment Opportunity Law (EEOL) which was passed when the Japanese Government ratified the United Nation's Convention of the Elimination of All Forms of Sex Discrimination against Women in 1985, purportedly aiming to ensure equal opportunity and equal treatment between the sexes in employment. However, measures adopted in this legislation have had little effect in achieving this purpose, revealing the lack of political will to tackle sexual inequality at work. This is particularly well demonstrated by the absence of criminal penalties for the violation of any prohibitory provisions set out in the EEOL, unlike the violation of provisions set out in the LSL (see Section 4).

Moreover, the EEOL prohibits only the most crude and direct forms of discrimination and does not encompass such concepts as indirect discrimination, which is incorporated into the SDA in Britain. It only prohibits the imposition of *different* conditions on women which would disadvantage them, such as a lower age limit for women than men to apply for a job, but allows the imposition of the *same* condition on both sexes even if these are less likely to be met by women than men. As discussed in the previous chapter, the prohibition of indirect discrimination is essential in order for part-time women employees in Britain to benefit from the anti-discrimination legislation. Otherwise, as is observed in the case of Japan, the anti-discrimination legislation, the EEOL, has played virtually no role in assisting *pato* women employees since the less favourable treatment of these women is considered as a lawful differentiation based on differences in labour-related factors rather than as a form of sex discrimination.

Art. 4 in the LSL and the EEOL 1985 are Japanese anti-discrimination regulations, which can be seen as equivalent to the EqPA 1970 and the SDA 1975 in Britain. However, the general effectiveness of these provisions is considerably less than that of the British anti-discrimination legislation. There is no coverage of “equal pay for work of equal value” and there is no concept of indirect discrimination. This means that under this provision, only *pato* women employees who do the same work as their formal employees can bring equal pay claims. This explains why so few claims for equal pay have been brought hitherto by *pato* women employees in Japan.

In Section 2, I also examine the way in which redundancy cases of *pato* women employees are handled in the courts under the framework of the LSL in order to identify the labour difference discourse in the legal context. In Japan, all disputes relating to rights of workers are principally dealt with in ordinary courts. A body called the Labour Relations Commission deals with disputes involving the interests of workers. However, it is very difficult to draw a clear line in this distribution of jurisdiction between the courts and the Commission, and all important cases discussed in this study were judged by the courts (for details of the labour dispute settlement mechanism in Japan, see Hanami 1985; Matsuda, 1993: 185-191). It should be noted that Japan adopts the civil law system, under which judges are, in theory, not bound by any previous decisions. The Constitution and statutes are the only binding source for them although the lower courts are bound by the decision of higher courts in any particular case. However, in reality judges anticipate the likely outcome of the particular cases they consider according to previous decisions made by the Higher courts in similar cases, most notably by the Supreme Court. The



effect of this in practice could be very close to that of precedent in the common law system although the binding power of previous decisions is not formalised. It has been argued that judgements of the courts, accumulated through a number of related cases may contribute to the formulation of a set of special legal rules which might extend statutory provisions and/or modify them (Oda, 1992: 53-57). This occurred in relation to redundancy cases where the courts formulated a set of special judicial rules as will be discussed in Section 2.

### The Law on Part-time Employees (PEL) 1993

A new piece of legislation, the Law on Part-time Employees (PEL), was introduced recently in order to govern specifically *pato* employment in Japan. The PEL is part of a series of legal reforms in the area of employment, which began with the introduction of the EEOL in 1985, reflecting the increase of women's participation in paid work as formal as well as informal employees such as *pato* employees (see Section 4 of this Chapter). The PEL 1993 consists of five chapters and various supplementary rules. Chapter One sets out the objectives of the law, the definition of *pato* employees, and the obligations of employers and the state. Chapter Two refers to a broad range of matters which should be laid down in detail by the Labour Minister according to government policies on *pato* employment. Chapter Three prescribes some measures to be taken by employers and the Government for *pato* employees. Chapter Four requires the establishment of an institution which conducts research, provides information and runs seminars on *pato* employment in order to assist both employers and *pato* workers to improve the situation. Chapter Five includes some miscellaneous rules.

The PEL contains few practical provisions and most of its content has little to do with the actual improvement of working conditions for *pato* workers. Instead, it entrusts the Labour Minister to make supplementary rules, to provide more precise guidelines for employers and to play a role in giving advice, guidance and recommendation to employers when it is necessary (Chapters Two and Three, PEL). The vague objective of the law is stated in Art. 1 as the promotion of “welfare” of *pato* employees and a rather abstract moral responsibility is set out for employers to implement a “balanced” treatment of *pato* employees in Art.3 in the PEL. These points will be discussed in detail in Sections 3 and 4 of this chapter.

More specific requirements for employers are stipulated in Chapter Three of the PEL although these are neither compulsory nor prohibitory but only exhortatory. For example, employers are required under the PEL to “make an effort” to distribute written job particulars promptly to newly hired *pato* employees (Art.6, PEL). The LSL, on the other hand, requires employers, with penalties in the case of violation, to give clear working terms and conditions to employees either orally or in writing at the time that contracts of employment are agreed (Art. 15, LSL). Matters relating to wages have to be communicated in writing (Art.5-(2), LSL Enforcement Role, 1947). These rules in principle apply to all employers irrespective of whether they are dealing with *pato* or formal employees. Art. 6 of the PEL is, therefore, seen as just an additional protection for *pato* employees by encouraging employers to provide written particulars concerning matters which are not required to be written down by the LSL. The PEL also requires employers to endeavour to consult with the representative of the majority of *pato* employees at

the workplace when they make or amend internal work rules (Art.7 PEL) and urges employers who regularly use a certain, specified, number of *pato* employees to make effort to appoint a manager who is responsible for the personnel management of *pato* employees (Art.9, PEL). These are the only requirements set out for employers in the PEL. Further recommendations are set out in the New Guidelines issued under the name of the Labour Minister based on the power given by the PEL, but these do not bind Employers legally (see Section 3 of this Chapter).

In analysing the PEL, I look not only at its content but also the New Guidelines issued by the Labour Minister as these supplement the PEL and such administrative interventions are very important in Japan where the bureaucracy is powerful and influential (see Williams 1993). The Ministries have power to issue administrative orders in related areas, which are in theory inferior to legislation introduced by the Diet (the Japanese Parliament) and therefore cannot overrule it. However, they often fill gaps left by the statutes made by the Diet when these contain ambiguous terms and conditions (which is often the case) by providing an official interpretation of them. Employment related issues are within the responsibility of the Ministry of Labour which consists of five major bureaux: Labour Policy; Labour Standards; Women and Minors; Employment Security; and Vocational Training. The activities of the Bureau of Women and Minors are of great relevance to this study since it has been deeply involved with shaping the regulation of *pato* employment. In particular, as will be discussed in Section 3 of this chapter, in the case of the PEL, the Ministry of Labour instructed how the new definition of *pato* employees in it should be interpreted.

## **2. The Labour Difference Discourse: Creating the Hierarchy of Employees**

### **Under the Framework of the Labour Standard Law 1947**

In this section, I examine the legal differentiation of *pato* employees observed in relation to equal pay and redundancy under the framework of the Labour Standard Law (LSL) 1947 since, as is the case of part-time employees in Britain, lower levels of pay and job security are the key problems which *pato* employees face in Japan. As described in Section 1, the LSL guarantees employment rights and protections to all employees irrespective of working hours or the length of service. In this sense, the LSL itself does not create the hierarchical division amongst employees in terms of their eligibility for statutory rights as the EPCA 1978 does in Britain. However, under the LSL, the less favourable treatment of *pato* employees at work is generally considered as legal since this is constituted as a differentiation based on contractual employment status, reflecting a supposed qualitative inferiority of *pato* to formal employees.

#### *Statutory Differentiation - Equal Pay*

As mentioned in Section 1, Art. 3 of the LSL prohibits discrimination on ground of “nationality”, “creed” and “social status”. In the *Fuji-Jukogyo Case* [1965] Romin 16/2/256, it was tested whether this clause, by the wording of “social status”, prohibits the differentiated treatment of employees based on employment status which is determined by contracts. The Utsunomiya District Court gave a decision which clarified the position of the court of this matter. It stated that:

“Social status” referred to in Art. 3, the LSL, does not include employment status arising from the contract of employment, such as temporary employees and formal employees, since the status of this kind is determined by different terms of employment contracts (Author’s translation). (Romin 16/2/256, at 258)

This suggests that a hierarchy of employees has been constructed based on contractual employment status, locating formal employees in the top of the hierarchy as they are the ones who are most privileged at work in comparison to other types of employees. According to this judgement the differentiated treatment of *pato* employees is also considered as deriving from a difference in contractual employment status, placing them in a position below formal employees in the hierarchy. The less favourable treatment of *pato* employees is, therefore, lawful under Art.3 in the LSL.

At the same time, Art.4 in the LSL lays down the principle of equal pay between the sexes. However, Art.4 prohibits only discrimination which fulfil the following two prerequisites: a) it derives directly from the employee concerned being a woman and b) she does the same work as her male counterparts. This means that the law does not prohibit the differentiated treatment of men and women based on elements other than sex, such as age, the length of service, the number of dependant family, kinds of jobs, job content, productivity, responsibility and working conditions (Sugeno, 1994: 119). Under this limited interpretation of Art.4 of the LSL, the possibility for *pato* women employees to bring an equal pay claim based on this provision is severely limited. Kazuo Sugeno suggests that they might be able to do so only when

all *pato* employees are women and all formal employees are men in the same workplace, and there are no differences in job content, experience and working hours, etc. between them (1994:156). Obviously, this is a very unlikely situation. Reflecting the lack of legal provision on which *pato* women can rely to claim equal pay, there have been very few cases in this area, and these cases often involve equal pay claims both between the sexes and between formal women and *pato* women employees as seen below.

However, some cases of disguised *pato* women employees can be close to the situation described above since they work as long as their formal counterparts and often perform the same work, as seen in the *Shirasuna* Case. The first equal pay claim was brought in 1983 by *ex-pato* women employees who were dismissed when the factory where they worked as production workers was closed.<sup>3</sup> They lodged a legal dispute against the company, which belongs to an enterprise group called *Shirasuna*, by bringing two complaints to the court. One is to claim unlawful dismissal and the other was an equal pay claim. Here I shall concentrate on the second of these.

The equal pay claim was made in relation to their formal *women* counterparts, mainly on the grounds that their discriminatory treatment in comparison is against the principle of equality which is embodied by Art. 14 in the Constitution (which sets out the principle of equality under the law) and Arts. 3 and 4 in the LSL. This claim separates the issue of the lower pay of *pato* employees from sex discrimination despite the reference to Art. 4 of the LSL, since they base their

argument more strongly on the grounds of equal pay between employees who are given different contractual employment status, either formal or *pato* status, rather than between men and women.

Technically speaking, the working hours of these *pato* employees were shorter than their formal counterparts because their fixed working hours were from 9:00 a.m. to 5:15 p.m., while formal employees worked from 8:30 a.m. to 5:20 p.m., a 35 minute difference in working hours. They performed exactly the same work as formal employees at the same production line which started operation at the time the *pato* employees arrived. This means that the actual work started at 9:00 a.m. for both *pato* and formal employees in the production line. Despite that, their monthly earnings were about half that of formal employees, which cannot be explained by any other factors but their nominal 35 minute shorter working hours and contractual employment status as *pato* employees. Although the complainants eagerly await the decision of this case, its progress has been very slow and the court has not yet settled the dispute. Meanwhile the legal struggle of women in the *Shirasuna* Case continues.

What the *Shirasuna* Case shows is that the complainants were disguised *pato* employees whose working conditions were little different from their formal counterparts but given different contractual employment status and treated much less favourably. At this stage, the less favourable treatment of disguised *pato* women employees is being questioned and challenged in the court on the basis of their “sameness” to formal employees. This suggests that under the current legal

framework set by the LSL and the PEL (which will be discussed in the next section) there is little scope for genuine *pato* women employees to claim equal pay to their formal male or female counterparts.

In addition, although the Constitution guarantees sexual equality under the law in every aspect of social life, it is difficult for *pato* women employees to rely directly upon the Constitution to bring their cases against employers. This is because the Constitution regulates mainly relationships between the state and individuals, not relationships between individuals. Employment contracts are concluded between two individual parties, employees and employers, except employees in the Government and state-owned enterprises. On the other hand, there is a possibility for *pato* women employees to rely upon Art. 90 in the Civil Law, which nullifies actions regarded by the court as being against public order and interests. This article was used by women workers in the pre-EEOL period successfully to challenge employers over the removal of the marriage bar and earlier retirement age which were often imposed upon women workers (*Sumitomo-Cement Case* [1966] Romin 20/4/715; *Nissan-Jidosha Case* [1981] Hanrei-jiho 998/3 (Law Reports Bulletin, hereafter referred to as Hanji, no.998, p.3). However, as will be demonstrated below, the labour difference discourse prevails in the courts, creating the hierarchy between formal and *pato* employees. In this context, it is unlikely that it can be argued that *pato* employees are equal to their formal counterparts under the general provision of the law, such as Art. 90 of the Civil Law.



In contrast to equal pay claims, there have been more cases which involve the redundancy of *pato* employees since the late 1960s (for example, *Shunpudo* Case [1967] Hanji 503/18). In decisions handed down by the courts in these redundancy cases, the labour difference discourse can be identified. As will be discussed below, the court recognises the necessity of limiting the power of employers to make employees redundant, including both formal and *pato* employees. However, it argues that the extent to which it should be limited would differ between the two categories of *pato* and formal employees. In order to legitimise the less favourable treatment of *pato* employees in redundancy, the court relies on the labour difference discourse, constructing *pato* employees as different and inferior to formal employees, demonstrating how the court plays an important role in creating the hierarchy of employees and the inferior position of *pato* to formal employees in it. In doing so, the court operates the law in a way which protects the job security of formal employees and maintains so-called “life-time” employment amongst them at the expense of *pato* employees, the majority of whom are women.

Below, I explain briefly first the general rules of dismissal and redundancy which have been developed under the framework of the LSL but extended by judicial rules which also apply to *pato* employees. Second, I discuss the termination of the fixed-term contract which would be considered as dismissal or redundancy. This is of great relevance to the cases examined subsequently. Then, I analyse the *Sanyo-Denki* Case [1990] Rodohanrei 558/44, (the Labour related Case Reports, hereafter

referred to as Rohan, no.558, p.44), [1992] Rohan 595/9; and the *Nihon-Denki* Cases [1994] Rohan 640/55 where *pato* women employees challenged their employers claiming that the termination of their fixed-term contracts should be regarded as redundancy.

### The General Rules of Dismissal and Redundancy

The LSL requires employers to give notice of at least 30 days when they intend to dismiss employees whose contracts do not specify the term of employment, irrespective of the length of service or the number of working hours (Art. 20, LSL). If employers fail to give such notice, they have to provide compensation which is equivalent to or more than 30 days' wages (Art. 4-2, LSL). However, even if employers follow this procedure, they cannot dismiss employees when there are statutory restrictions. Examples of these are: dismissal during the period of leave taken by employees either because of work-related injury or disease, or during statutory maternity leave, and within 30 days when they return to work after such leave (Art. 19-1, LSL); discriminatory dismissal based on the nationality, creed and social status of employees (Art.3, LSL); on the fact that employees have brought complaints against employers to the authorities alleging law breaking (Art 104, LSL); on sex (Art. 11, EEOL); on the claim of one-year's unpaid leave for caring for a child/children of under one year of age (Art.7, the Law on Leave from Work for Child Care (LWCCL)); and on labour union activities (Art.28, Constitution).

Moreover, the Supreme Court has established stricter judicial rules for effective dismissal to take place in individual cases, setting out two prerequisites: an

objective reason to dismiss employees must be identified; and dismissal of the employees must be considered as appropriate. If the courts are not satisfied on these two points, the dismissal is null and void. The Supreme Court justified its intervention beyond statutory regulation by declaring that employers, though they have right to dismiss employees<sup>4</sup>, are not allowed to “abuse” this right (Oda, 1992: 331; Sugeno, 1994: 381-388: see *Nihon-Shokuen* Case [1975] Saiko-saibansho-minji-hanreishu 29/4/456 (the Supreme Court Civil Case Reports, hereafter referred to as Minshu, vol.29, no.4, p.456) and the *Kochi-Hoso* Case [1977] Rohan 268/17.<sup>5</sup> By applying these rules, the court severely limits employers’ ability to dismiss employees in favour of the protection of employees from losing their jobs.

Redundancy which arises from management necessity, such as the reduction of business demand during a period of economic downturn, is one of the justifiable reasons for dismissal (Sugeno, 1994: 382). However, the court also imposes a strict set of judicial rules on employers in order to carry out a legally effective redundancy. The rules are summarised as five prerequisites in one case dealt with by the Osaka District Court. These are: i) the company has been facing a serious business difficulty; ii) the company has made considerable efforts to avoid redundancies; iii) despite all efforts, there is still a need for a personnel cut; iv) the standards set for choosing employees for redundancy are objective and reasonable and their application is fair; and v) the company has fully consulted with employees and/or labour unions in the process of carrying out redundancies (*Osaka-Zosen* Case [1989] Rohan 545/15). This is largely in line with the position of the Supreme Court in a earlier case (*Tokyo-Sanso* Case [1980] Rodo-keizai-harei-sokuho 1045/9

(the Labour and Economy-related Case Reports Bulletin, hereafter referred as Rokeisoku, no.1045, p.9).

The above strict approach of the court in restricting redundancy has been explained as necessary to maintain the long-term employment system in Japan (Sugeno, 1994: 388). Hiroshi Oda, a lawyer, also emphasises that the severe restriction of redundancy by the court is necessary in order to support an existing social practice of life-time employment in Japan. He states as follows:

*In reality, a majority of people work in the same company after finishing school and remain there until retirement.* Naturally, the employee is legally free to quit and move to another company, but *he* seldom does so. On the other hand, companies rarely dismiss employees even in recession (Emphases added). (Oda, 1992: 330)

However, many commentators point out that a large number of women employees are in practice excluded from the life-time employment system (Sano, 1983; Koike, 1988; Saso, 1990; Steven, 1990, see Chapter 3). It is, therefore, not a coincidence that Oda uses “he” based on his understanding of those who are formal employees under life-time employment, revealing that “a majority of people” means “a majority of men”. This, therefore, suggests the view that these strict standards in dismissal and redundancy were invented to protect the interests of *formal male* employees.<sup>6</sup>

However, once the legal rules are established, these must also be applied to those who were not originally intended as beneficiaries. First, the above legal rules must

be applied to the redundancy of formal women employees as the law requires equal treatment between the sexes in the same position (Art.4, LSL; Art. 1-2, the Civil Law; Art. 14, Constitution). Secondly, *pato* employees under the non-specific term, that is permanent, contract can also benefit since dismissal and redundancy take place when employers terminate permanent contracts irrespective of the number of working hours. Therefore, the redundancy of permanent *pato* employees is also judged along the lines of the above judicial rules developed by the court.

The court confirmed that the above judicial rules of dismissal and redundancy also apply to permanent *pato* employees in an early case where the effect of the redundancy of permanent *pato* employees was nullified (*Shunpudo* Case [1967] Hanji 503/18). In this case the court judged that there was no real necessity for the company to reduce the number of *pato* employees on economic grounds. This case shows that the judicial rules are equally applied to protect formal and *pato* employees and, in this sense, the hierarchy of employees does not appear. However, this conclusion was drawn in a situation where these permanent *pato* employees were not in direct competition with their formal counterparts. This means that the company or the court in this particular case were not required to make decision about which group of employees should be made redundant. Although the court does not allow employers to dismiss or make *pato* employees redundant without real economic needs to do so, the hierarchy becomes clear in cases where there are indeed such needs and competition arises between formal and *pato* employees as discussed below.

### Fixed-term Contracts

The Survey of Part-time Employees 1990 found that 33.8 per cent of *pato* women employees had fixed-term contracts and the average employment period was 7.4 months amongst these employees.<sup>7</sup> However, 74.5 per cent of *pato* women employees under fixed-term contracts stated that their contracts included a renewal clause, revealing the regular, rather than temporary, nature of their employment (ML, PPRD, 1991:132-133).

Fixed-term contracts of employment come to end with the expiry of that term. This means that, unlike permanent contracts, it is not necessary to give notice or provide compensation for the termination of the contract at the time of expiry. The Civil Law states that, if employees maintain their positions and work after the expiry date and employers do not object to it, it can be assumed that the contract is renewed tacitly with identical conditions to the previous contracts (Art. 629-1, Civil Law).

At the same time, the LSL does not allow the conclusion of contracts of employment with a fixed-term of *over one year*, unless the period is specified as necessary for the accomplishment of a particular project (Art. 14, LSL). The lawmakers at the time of the introduction of the LSL in 1947 found it necessary to limit the employment period which can be concluded under fixed-term contracts under one year in order to prevent forced labour, a practice which widely occurred in pre-war Japan (Kawahigashi, 1991: 38-45; Sugeno, 1994: 4, 130). For the same purpose, Civil Law provides the right to permanent employees to cancel the contract at any time if they give notice to employers of two weeks (Art. 627, Civil

Law). However, the situation in Japan has changed dramatically in the post-war period and forced labour has lost its significance in the current Japanese labour market. It is, therefore, questionable whether the limit of the employment period set in the LSL is of any use. Ironically, it now has the effect of keeping the employment period of fixed-term contracts short and, hence, making the position of employees with the fixed-term contract insecure.

Reflecting the altered situation of the labour market in the post-war period, where employees' main concern is job security, the termination of fixed-term employment which had been previously renewed repeatedly became one of the important focuses in labour-related law suits in the post-war period (Sugeno, 1994: 148). Through several cases, the courts have established a judicial rule which effectively modifies the above regulations of fixed-term contract in the Civil Law and LSL. One such case involved male factory workers, who brought their complaint to the court when their contracts were terminated on the grounds of the expiry of the contractual period. They were employed under the fixed-term contract of two months, but the contract had been repeatedly renewed between five and 23 times and their employer had expressed his intention to keep them as long as possible. The Supreme Court confirmed that these contracts were tantamount to non-fixed-term contracts and, therefore, they should not be allowed to be terminated simply on the grounds of the expiry date, and the general rules of dismissal and redundancy would be "by analogy" applied to these cases (*Toshiba-Yanagimachi-Kojo Case* [1974] Minshu 28/5/927).

It should be emphasised, however, that the characteristics of complainants in early cases were not only being employed on a *fixed-term contract* but also on a *full-time regular* basis and they were predominantly *male* workers. The Japanese labour market has gone through a transition since the early 1950s when life-time or long-term employment practice started to be observed amongst workers in some private companies (Hunter, 1989: 259-260). During the transitional period, many “male” workers were employed on a much less secure basis. One of such precarious forms of employment amongst them was being on a fixed-term contract, and some male workers in this position brought their cases to the court. As a result, the court invented the above judicial rule to deal with fixed-term contracts on the basis of *men* being employed on a *full-time regular* basis.

While the judicial rule was established to deal with the termination of repeatedly renewed fixed-term contracts in the framework of dismissal, changes in the labour market have meant that the great majority of male workers have been absorbed into formal employment where the non-specific-term contract is the norm (see Chapter 3). On the other hand, a large number of women have entered the *pato* labour market where employment contracts can be concluded on either a permanent or a fixed-term basis. In particular, there are many employers who impose fixed term contracts on *pato* women employees in order to take advantage of the easy termination of the contracts on grounds of the expiry date. Recognising the prevalence and disadvantage of the fixed-term contract amongst *pato* employees, the New Guidelines set out standards which largely follow the rule applied to the case of dismissal. Rule 1(5), Section Two reads:



(i) Employers have to make an effort to set the longest possible term of employment (within the statutory maximum of one year) with *pato* employees who have been continuously employed for over a year, as a result of the renewal(s) of their fixed-term contracts, if the term of employment is to be renewed again.

(ii) In the event that the contracts are not to be renewed with *pato* employees who have been continuously employed over one year, employers must endeavour to *give notice of the termination of the contract of at least 30 days* (Emphasis added).

These rules reflect the altered composition of workers on fixed-term contracts from full-time male to *pato* women employees. Accompanying this change, a gradual shift has also started since the late 1960s in legal cases which involve the termination of fixed-term contracts, from those brought by male workers, to those brought by *pato* women employees.<sup>8</sup> In the 1980s and early 90s a stream of cases appeared in which *pato* women employees have entered into disputes with employers over the termination of their fixed-term contracts (for example, *Heiankaku* Case [1986] Rohan 480/535; *Fuji-Jidosha-Gakko* Case [1988] Rohan 528/61; *Sanyo-Denki* Case [1990] Rohan 558/44, [1992] Rohan 595/9; *Nihon-Denki* Case [1994] Rohan 640/55; see below). The established judicial rules have applied equally to the termination of fixed-term contracts of regular full-time male and *pato* women employees in these cases although the hierarchy between formal and *pato* employees has been underlined in these cases as will be discussed below.

### The Redundancy of *Pato* before Formal Employees

The courts protect *pato* employees to some extent from arbitrary dismissals by employers and apply the judicial rules discussed above to them despite the fact that these rules were originally established either for formal male or full-time regular male employees on fixed-term contracts. However, *pato* employees are clearly differentiated from formal employees by the courts irrespective of whether or not the courts deliver a decision in favour of *pato* employees in individual cases. Below I examine two cases, *Sanyo-Denki* Case [1990] Rohan 558/44, [1992] Rohan 595/9 and *Nihon-Denki* Case [1994] Rohan 640/55, where the legality of the termination of contracts of *pato* women employees on economic grounds was disputed. The outcomes of the two cases were in opposition to each other although, in both cases, the courts decided that the termination of the fixed-term contract of *pato* women employees involved should be considered as redundancy. In the first case, the court prevented the company from making *pato* women employees redundant while in the second case, the company was allowed to do so.

In these two cases the courts took different views concerning how strictly employers' power should be limited in the case of the redundancy of *pato* employees. However, in both cases, the courts agreed that the dismissal of *pato* employees can be carried out with less strict criteria than those applied to the dismissal of formal employees. In expressing this view, the courts adopt the labour difference discourse and emphasise the inferior quality of *pato* employees, creating the hierarchical division between formal and *pato* employees. As a result, the courts prioritise the job security of formal employees over that of *pato* employees, making

the position of the latter less secure than the former. In doing this, the courts do not mention gender at all, relying upon the labour difference discourse despite the fact that the redundancy of *pato* employees means the redundancy of women.

In the *Sanyo-Denki* Case, the company has recruited “housewives” as *pato* employees for its assembly lines since the 1960 due to the severity of prevailing labour shortage during the period of business expansion. In 1980 the company set up a new system in which these *pato* employees were divided into temporary and regular categories. Temporary *pato* employees worked six hours per day and exchanged two month fixed-term contracts with the company. These temporary *pato* employees could become regular *pato* employees in two years if they were continuously employed, their attendance rate was more than 92 per cent, and they passed health checks and interviews. The daily working hours of regular *pato* employees were seven hours, which is one hour longer than those of temporary *pato* employees, and they were given one year fixed-term contracts. In addition, they were employed with better terms and conditions than temporary *pato* employees (but not equal to those of formal employees) in terms of the normal hourly and overtime rates of pay, and entitlement to paid holidays, time off for caring for children, compassionate leave and pay (for weddings and funerals) and retirement allowance. Although fixed-term contracts of either two months or one year were concluded between *pato* employees and the company, these were sequentially and repeatedly renewed.

Four divisions of Sanyo in Osaka operated on a financially self-sustaining basis, manufacturing goods mainly for export, and were badly hit by the sudden appreciation of the yen since the middle of the 1980s. First, almost all contracts of temporary *pato* employees on assembly lines were terminated in 1986 in these four divisions, which amounted to 227 employees. The company provided compensation equivalent to between five and six times monthly earnings and, according to the company, there were no serious complaints from these temporary *pato* employees. Then, all regular *pato* employees were given temporary leave from work for two weeks with 80 per cent of their normal pay. Finally, the divisions decided in 1987 to terminate the contracts of 1,180 regular *pato* employees with an average compensation of ¥840,000 (£5,250), which was equivalent to eight times monthly earnings. The company kept on a small number of *pato* employees who were disabled, single mothers and whose spouses were disabled.

After this event, 15 regular *pato* women employees brought their complaints against Sanyo. They claimed that their case should be treated as redundancy (which usually takes place in relation to permanent employees) not as the termination of the fixed-term contract on the grounds that the term of one year in their contract was set for the sake of formality and the contracts had been repeatedly renewed. Indeed their employment periods ranged from 11 years and 10 months to six years and five months. In the light of the stricter legal rules established for redundancy, they claimed, there were no justifiable reasons for the company to make them redundant and therefore, it was the abuse of this right by the company.

The court first judged that the renewal of the contracts of these regular *pato* employees was expected unless an unusual circumstance arises, such as the sudden deterioration of business demands. It accepted that the company was indeed in such difficulty and was forced to reduce the number of staff. However, the court pointed out that, even in a case such as this, employers had a duty to give careful consideration to the means and the scale of termination of the contracts of these regular *pato* employees and were not allowed to do so all at once simply because they were on fixed-term *pato* contracts. In this particular case, the court decided that the company had not made enough effort to avoid the mass termination of the fixed-term contracts of regular *pato* employees and nullified this effect.

While the court delivered the decision in favour of these women employees, it suggested that it was generally acceptable to treat *pato* and formal employees differently to some extent because of the differences between the two groups of employees. The court argued as follows.

In this case, the contracts of these [regular *pato*] employees are intended to be renewed unless an usual circumstance arises. Therefore, the judicial rules of redundancy are applied analogously to the termination of the contracts of these employees *although it cannot be denied that there is a reasonable difference between the dismissal of these employees and that of formal employees who have concluded permanent contract under the expectation of so-called life-time employment* (Author's translation. Emphasis added).  
(Rohan 595/9, at 17)

This statement demonstrates that there is a clear hierarchy between regular *pato* and formal employees in the mind of judges even when their working patterns appear to be very close. Before reaching this conclusion, the court summarised the grounds of difference between them and formal employees in this particular case as follows.

regular [*pato*] employees exchanged a contract in which the term of employment and daily working hours are set longer than those of temporary [*pato*] employees. However, they engaged in the same work as temporary [*pato*] employees. *Their work is simple and repetitive, which is different from work performed by formal employees. It is also no company practice for regular [*pato*] employees to be formal employees* (Author's translation. Emphases added). (Rohan 595/9, at 16)

Here it can be seen that the court has created a hierarchy between formal and regular *pato* employees based upon qualitative differences, which is a component of the labour difference discourse. *Pato* employees performed supposedly simpler tasks, even if these were indispensable for the manufacturing process, than those carried out by formal employees. The different and inferior value of the regular *pato* employees was also attributed to their lower levels of training, responsibility and transferability as compared to formal employees. These are similar to the argument which was put forward by the managers interviewed in Shirahama as a justification to differentiate and treat *pato* employees less favourably (see Chapter 4). The court, too, has constructed the difference of *pato* employment in terms of various labour-related factors and legitimised the disadvantaged position of *pato* employees in comparison to their formal counterparts.

However, it should be emphasised that it is the company that assigns *pato* employees these relatively simpler and repetitive tasks and formal employees under long-term employment to more complex tasks requiring some form of training. This means that the company treats *pato* employees unequally in training and, as a result, these employees cannot develop higher skills. Furthermore, in this case it was reported to the court that there was no practice at all for *pato* employees to be promoted to the position of formal employees. The court points to this fact as if it proves the qualitative difference between formal and *pato* employees, that is the inferiority of the latter, since they were considered by the company as incapable of being transferred to formal positions. The failure of the court to recognise this as a discriminatory treatment which *pato* employees face at work is striking. Employers denied both training and opportunity for transfer to formal positions to a particular group of employees, that is *pato* employees, the majority of whom are women.

Nevertheless, the court nullified the effect of the redundancy of *pato* employees in this case. In the commentary of the major labour relations case report, it was speculated that the court had delivered this decision because of the following two factors. One is that the characteristics of the *pato* women employees concerned are similar to, if not the same as, their formal counterparts in terms of their long working hours (seven hours a day) and periods of service (from 11 years and ten months to six years and five months) and their indispensable contribution to the manufacturing process. The other is that this was a typical case of mass redundancy where 1,180 regular *pato* employees were dismissed (Commentary in Rohan 595/9, at 10). In this context, the court found it necessary to apply the strict judicial rules

set out for redundancy which require employers to establish a) the clear necessity to reduce the number of personnel, that is a severe decline in business demand in this case, and b) the due process of redundancy.

Certainly the courts were concerned with the effect of this kind of mass redundancy on workers. However, this does not mean that they are in favour of the equal treatment of formal and *pato* employees. Rather the courts positively accepts the hierarchy of the two categories of employees. This stance of the courts becomes clearer in the next case where a much smaller scale of redundancy was carried out, and the working hours and the length of service of *pato* women employees involved were shorter than those in the case discussed above.

In the *Nihon-Denki* Case, the company set out special work rules for *pato* employees in which they were defined as those who were employed on a daily basis or under a fixed-term contract of up to six months and whose daily or weekly fixed working hours were shorter than those of formal employees. They were treated differently from formal employees in various ways: they were paid hourly, have no resignation allowance; would be asked to leave at the time of the expiry of the employment period; and have no access to various training, assessment and grading schemes which applied to formal employees within the company.

In 1993, the company terminated the contracts of 62 out of 99 *pato* employees because of recession. Two women *pato* employees whose contracts were terminated at that time brought their complaints to the court on the grounds that



this was a case of redundancy where the strict judicial rules should be applied. One woman was first employed in February 1992 under a fixed-term contract of about one and half months and, then, exchanged a new fixed-term contract of six months and renewed this contract twice. She worked from 8:50 a.m. to 4.50 p.m., including a one hour break. The other was employed as a temporary worker in 1980 and exchanged a fixed-term contract of six months as a *pato* employee with the company in 1984. She had worked from 9:20 a.m. to 4:20 p.m., including a one hour break until 1990, and extended her working hours to 5:20 p.m. after that. In total she renewed her six month contract 18 times.

As with the earlier case, the court decided that this was also a case of redundancy where the judicial rules for redundancy should be applied and accepted that there was a real necessity for the company to reduce the number of employees. However, it reached an opposite conclusion from the earlier case by judging that the company fulfilled the necessary requirements to proceed with the redundancy of *pato* employees. The court insisted that the dismissal of *pato* employees should be treated differently from and less strictly than that of formal employees because *pato* employees “generally perform *simple, repetitive and supportive* work” in the company (Rohan [1994] 640/55 at 57). It should be noted, however, that in this particular case, one of the two complainants was a general office administrator and the other was responsible for work called “tracing” which involves making clean copies of drawings made by specialists and operating a computer system to produce three dimensional drawings. It is difficult to accept that general office administration and the work performed by the second *pato* employee can be so simple.

The court pointed to another factor to differentiate *pato* employees as follows.

Although it is an abuse if the employer terminated the contracts of these *pato* workers without any particular reason. However, it has established that *these pato workers were hired by a relatively simple procedure* in comparison to formal employees who exchange permanent contracts with the company under the expectation of life-time employment. *The standard would be naturally different in judging the effect of the refusal to renew the contracts of pato workers from the dismissal of formal employees* (Author's translation. Emphases added). (Rohan [1994] 640/55 at 57)

Here the court differentiated these *pato* from their formal counterparts because they had been hired through a "simple procedure", suggesting that it is justifiable to fire relatively easily those who are hired by a simple procedure. However, the practice of hiring *pato* employees in this way saves management time and costs, and is clearly nothing to do with the quality of work performed by these employees. This demonstrates that the difference perceived by the court between *pato* and formal employees has been constructed based on their being employed on different contractual employment status. Again, relying upon the labour difference discourse, the court legitimises the less favourable treatment of *pato* employees on the grounds of their inferior quality to formal employees. However, in many cases like this, it is rather difficult to see how *pato* employees are inferior.

Based on the constructed inferiority of *pato* employees, the court turned down various arguments put forward by the two complainants in this case in order to demonstrate that the company did not make enough effort to avoid the redundancy

of *pato* employees. One of their arguments was that the company employed new graduates as formal employees in 1995 when they terminated the contracts of *pato* employees without examining the possibility of giving the *pato* employees priority in applying for the position of formal employees. These new recruits, the complainants argued, indicated that the company had room to maintain its staffing level and, therefore, had no real necessity to terminate their contracts. Responding to this, the court stated:

The recruitment of *new graduates* is for the appointment of *formal employees who should be the core workforce of the company*. It is different from the case if the company employed new *pato* workers while it had discharged the complainants. The recruitment of new graduates cannot be seen immediately as a factor which refutes the necessity of the refusal to renew the contracts of *pato* workers. [...] The company and its associated companies had already reduced the planned number of new recruits for 1995 and stopped issuing unofficial decisions of appointment to new graduates for 1995 at the time of July 1994. *It is not appropriate for the company to cancel these promises of employment given to the new graduates in order to avoid the termination of the contracts of pato workers* (Author's translation. Emphases added). (Rohan [1994] 640/55 at 59)

Here, the hierarchy of employees is clear: while formal employees were described by the court as core workers in the company, by implication, *pato* employees were viewed as peripheral workers. Furthermore, the court accepts that new graduates

can be a core workforce as formal employees for the company while declining the possibility of *pato* employees being transferred to these positions. This means that the court views *pato* employees as a substantively different category of employees who cannot be transferred to formal positions, nor can they compensate for formal employees. Furthermore, the above statement suggests priority in the case of dismissal: *pato* employees before not only existing formal employees but also before new graduates who were offered jobs as formal employees in the following year, but had not yet taken up their posts.

The complainants further argued that the company did not take any steps in order to avoid the termination of the contracts of *pato* workers, such as transferring them to associate companies, giving them a temporary leave from service, or shortening their working hours. The court responded to this as follows.

According to the evidence, in this company the transfer of employees to associated companies and a temporary leave from service are *systems of employment adjustment for formal employees only*. There is, therefore, *no possibility to apply the system to pato workers*. Also, shortening the working hours of *pato* workers could not be useful in a situation where the company had to terminate the contracts of more than 60 out of 99 *pato* workers (Author's translation. Emphases added).(Rohan [1994] 640/55 at 61)

What the court is highlighting here is that, while formal employees are considered as those who must be protected from dismissal by every possible means, including their transfer to associated companies and giving them temporary leave, *pato*

employees are viewed as those who do not merit such protections. They are considered by the court as qualitatively different from their formal counterparts because they are hired by a “simple” procedure and perform “simple” work. In consequence, it is the inferior quality of *pato* employees which legitimises their redundancy before formal employees.

Here gender was not mentioned, since the difference of *pato* and formal employees is constructed in terms of labour-related factors and this is the focus of the argument. However, as will be discussed in Section 4, this differentiation is indeed gendered and affects women disproportionately since it is women who re-enter the labour market often as *pato* employees. This means that, although formal employment would be taken up by both male and female new graduates equally, this system operates to reserve formal employment for men since very few men take a career break to care for children and other members of the family. The courts have created a hierarchy of employees based on the labour difference discourse and endorsed the less favourable treatment of *pato* employees without taking into account the sex-specific nature of this issue in the current Japanese labour market and in society more generally.

To summarise, in Japan the hierarchy of employees is not immediately obvious in the access to rights and protection provided in the LSL 1947 and the application of judicial rules since employment rights are, in theory, guaranteed to all employees irrespective of their working hours and/or the length of service and the rules are applied equally to both formal and *pato* employees. However, the hierarchical

differentiation of the two categories of employees becomes clear in cases where the courts have to decide who loses a job before whom. In legitimising the practice of making *pato* employees redundant before formal employees, the courts point to the different and inferior quality of *pato* to formal employees which is reflected in their inferior contractual employment status. These arguments have formed the labour difference discourse which has been predominant so far in the Japanese legal scene. Through the operation of this discourse, the law has created the hierarchy of employees where *pato* employees are placed below formal employees. This hierarchical differentiation of employees makes it possible for the courts to award formal employees maximum protection in the case of redundancy at the expense of informal employees, such as *pato* employees, while obscuring and ignoring the gender specific formation of *pato* employment and sex inequality in it.

### **3. The Labour Difference Discourse: Reshaping the Hierarchy**

#### **The Law on Part-time Employees 1993**

This section focuses on how the Law on Part-time Employees (PEL) has reshaped the hierarchy of employees by redefining *pato* employment as an employment pattern of shorter working hours and positioning a different and inferior value of *pato* employees based upon their shorter working hours, and/or factors which are derived from there. As discussed in Section 2 of this chapter, under the LSL, the hierarchy of employees was established in the Japanese legal scene long before the implementation of the PEL. I suggest, however, that the PEL 1993 reshaped this hierarchy by shifting emphasis from the differing contractual employment status of *pato* employees to their shorter hours. Below, I first examine the definition of *pato* employees given in the PEL and the official interpretation of it provided by the Ministry of Labour, focusing upon the exclusion of disguised *pato* from the PEL. Then, I analyse the content of the PEL and the New Guidelines issued under the PEL by the Ministry of Labour alongside arguments which appeared in the legislative bodies, underlining the hierarchical differentiation of formal and *pato* employees.

#### *Redefining Pato Employees*

Prior to the introduction of the PEL, the Ministry of Labour provided guidelines, entitled “the Outline of Measures for *Pato* Employment” (hereafter referred to as the Outline), which was used as the basis of the PEL. However, the definition of

*pato* employees given in the PEL is different from that given in the Outline. Art.2 in Chapter One of the PEL gives the definition of *pato* employees as those “whose fixed working hours *per week* are *shorter* than those of formal employees who are employed for the same work at the same workplace” (Emphases added). The Ministry of Labour provided an “official” interpretation of the new definition given in the PEL, referring to the difference between the definition in the Outlines and that in the PEL in order to clarify who is covered by the PEL. First, the PEL mentions only weekly working hours of part-time employees while the Outline included daily, weekly and monthly working hours in setting comparative standards. Second, the PEL is less clear in terms of how much shorter the fixed working hours need to be to define workers as part-timers than the Outline which stated “considerably” shorter. This “considerably” was interpreted by the Ministry as 10 to 20 per cent shorter than the working hours of their formal counterparts (Sakai, 1993: 180).

Kazumi Matsui, at the time the head of the Women’s Labour Section, Women and Minor’s Bureau in the Ministry of Labour, answered these questions in a seminar, which was later reported in a journal. First, if there are no fixed weekly working hours, these will be calculated from actual daily or monthly working hours. Second and more importantly, Matsui claims that the PEL is intended to include every employee who works shorter hours than their formal counterparts without considering the degree of difference. This is a different position from that taken in the previous Outline. To emphasise this point and to make it clear who can be



categorised as a *pato* worker within the definition of the PEL, Matsui gives six specific cases.

- I. Given only one type of job in the workplace and 100 formal employees who are engaged in the job work 40 hours per week alongside 1)100 informal employees with 40 hours, 2)100 informal employees with 35 hours, 3)100 informal employees with 30 hours, and 4)100 informal employees with 25 hours per week. In this case, the last three categories, 2), 3) and 4), of informal employees are considered as *pato* employees who are covered by the PEL but not the category 1) of informal workers.
- II. Given only one type of job in the workplace and 100 formal employees who are engaged in the job work 40 hours per week and another 100 formal employees who are engaged in the job work 35 hours per week alongside the above-mentioned categories of informal employees. In this case, judgement is based on working hours of formal employees who work 40 hours per week. Thus, informal employees in category 2) are still regarded as *pato* employees as well as 3) and 4).
- III. Given only one type of job in the workplace and 100 formal employees who are engaged in the job work 35 hours per week, but only one formal employee who works 40 hours per week alongside the above mentioned categories of informal workers. In this case category 2) of informal employees are seen as *pato* employees as well as 3) and 4) *even when there is only one formal employee who works 40 hours per week.*

IV. Given two different types (A & B) of job in the workplace. 100 formal employees are engaged in the A type of job and work 40 hours per week while another 100 formal employees are engaged in the B type of job and work 35 hours per week. There are four categories 1), 2), 3) and 4) of informal employees in the A type of job and three categories 2), 3) and 4) in the B type of job, as mentioned in i) above. In this case informal employees in categories 2) 3), and 4) in the A type of job, and 3) and 4) in the B type of job are covered by the PEL.

V. Given two different types (A & B) of job in the workplace, 100 formal employees engaged in the A type of job and work 40 hours per week but there are no formal employees in the B type of job. In both the A and B types of job, there are four categories 1), 2), 3) and 4) of informal employees as mentioned in i) above. In this case, informal employees in categories 2), 3) and 4) in both the A and B types of job are covered by the PEL.

VI. Given two different types (A & B) of job in the workplace, 100 formal employees engaged in the A type of job and work 40 hours per week but only one formal employee in the B type of jobs works 35 hours per week. In the A type of job, there are four categories 1), 2), 3) and 4) of informal employees and in the B type of job, there are three categories 2), 3) and 4) as mentioned in i). In this case, informal employees in categories 2), 3), and 4) in both the A and B types of job are covered by the PEL. *This is an exception to the general rule established in iv) which excludes category 2) of informal employees in the B type of job from being seen as part-time employees* (Author's Translation. Emphases added). (Matsui, K., 1994: 7-9)

Two general rules can be drawn from these rather elaborate examples given by Matsui. First, the PEL does not cover informal employees who work as long as their formal counterparts as it defines part-time employees as those who work shorter hours. This is shown in the above examples (except the case of VI) by the repeated exclusion from the coverage of the PEL of informal employees whose working hours are as long as their formal counterparts. This suggests that *pato* employment has been constructed through the exclusion of disguised *pato* from the legal definition, although they are often included in the category of *pato* employees at the workplace.

The second rule drawn from Matsui's examples is that as many informal employees as possible should be covered by the PEL as *pato* employees. This is highlighted by the following cases shown in Matsui's examples. In cases II and III, the longer working hours of those formal employees who do the same type of job as informal employees are taken as a standard to determine whether or not informal employees are defined as *pato* employees under the PEL. Moreover, while the case of V sets out the general rule to compare the numbers of working hours of formal employees in the *same* type of job, case VI creates an exception to this rule by allowing a comparison between formal and informal employees who are engaged in a *different* type of job because there is only one formal employee who is doing the *same* job as informal employees and who works shorter hours than the other formal employees. Taking the longer working hours of the formal employees as the standard despite their engagement in different jobs, all informal employees in case VI who work

more than their formal counterparts who perform the same job are considered as *pato* employees. In order to justify this rather perverse rule, Matsui claims that:

[if the norm established in case V is applied even in a case like VI] it allows the number of employees who can be regarded as *pato* employees to be reduced intentionally. (1994: 9)

However, this does not explain why Matsui or the Ministry of Labour wishes to increase the number of employees who can be regarded as *pato* employees, deploying a very technical and artificial definition of *pato* employees to do so.

While the above interpretation of the definition of part-time employees exposes that the rule is manipulated artificially, this raises the following questions. First, why does the PEL specifically exclude informal employees who work as long hours as formal employees, that is disguised *pato*, from its scope; and, since the exclusion suggests that disguised *pato* employees are not *pato* employees in legal terms, should they then be considered as formal employees in the law? Second, why does the Ministry of Labour wish to classify as many disguised *pato* workers as possible as *pato* employees by inventing an exception as seen in a case like VI above? As shown below, although the exclusion of disguised *pato* employees facilitates the reapportionment of the difference and inferiority of *pato* employees based upon their shorter working hours, it draws attention to the legal position of many disguised *pato* women employees and the differentiated position based not upon working hours but upon contractual employment status.

In Matsui's examples, informal employees who are not in the category of *pato* employees under the PEL are those in category 1) of informal employees in cases I, II, III, V and VI, and those in category 2) of informal employees in the B type of job in case IV. Their fixed working hours are the same as those of their formal counterparts and even longer in the exceptional case of VI. In practice, these employees are often treated as *pato* despite their fixed working hours being as long as those of their formal counterparts, forming the category of disguised *pato* employees (see Chapter 4).

Prior to the introduction of the PEL, a special study group was established in order to provide a report to the Government concerning how the law on *pato* employment should be formulated. This study group, which consisted of academics, representatives of labour unions and employers' associations, recommended leaving disguised *pato* out of the scope of the PEL. Akira Takanashi, the Chair of this study group, explained the reasons why the group considered that disguised *pato* employees should be excluded from the PEL in a special Labour Committee meeting in the Lower Diet as follows.

It is necessary to define who is under the application of the law. [.....] The most *typical* *pato* employees are those who work shorter working hours. Therefore, we thought that the focus of this law should be on these employees and so-called full-time *pato* are beyond this scope. Of course, we are not saying that there is no problem with full-time *pato*. On the contrary, this involves various complex problems and it is necessary to provide some regulatory measures for them from a different angle but we did not have

sufficient time to consider this matter. So that, we decided that the present law should deal with the *internationally recognised* issue of workers with shorter working hours (Emphases added. Author's translation). (Lower Diet Secretariat, 1993: 2)

This comment emphasises that the exclusion of “full-time *pato*”, that is disguised *pato*, from the PEL is based on the judgement that “typical” *pato* employees are those who work shorter working hours than formal employees, in addition to the lack of sufficient time to consider the matter further. This suggests, by implication, that disguised *pato* are “atypical” *pato* and, that is why they should be excluded from a law which deals with typical *pato* employees who actually work shorter hours than their formal counterparts. This shows the operation of discourse in the process of normalising genuine *pato* employees while defining disguised *pato* as abnormal in the context of the PEL (though in a wider employment context, formal employment is the norm). The above comment clearly demonstrates Takanashi's recognition of disguised *pato* being a particular problem in Japan, but the question of how these workers should be categorised and treated under the law was left unresolved, although the apparent lack of any reference to, or remedy for the situation, of these disguised *pato* in the PEL has been strongly criticised by many lawyers (for example, see Owaki, 1994: 10-11).

As will be seen in the debate over *pato* employment below (see *Reinforcing the Difference of Pato Employees*), the Ministry of Labour underlines the difference of *pato* employees based on their shorter working hours and the differences which

derive from this characteristic. In this context, the phenomenon of disguised *pato* is clearly an obstacle to the construction of *pato* as different from formal employment based on shorter working hours. The new definition of *pato* employees based upon working hours introduced by the PEL enables the Government, including the Ministry of Labour, to avoid the obstacle of disguised *pato* employees by excluding them from the category of *pato* employment by labelling them as 'atypical'. Thus, *pato* employment has been legally constructed in the PEL in a particular way based upon the exclusion of disguised *pato* from the category of *pato* employees. The law has initiated the process to redefine *pato* employees in terms of shorter working hours and, on this basis, *pato* is constructed as different from formal employment in the law, rather than its form of contractual employment status which has in reality been the defining characteristic.

I suggest here that the exclusion of disguised *pato* employees from the category of *pato* employees is a necessary first step for the reshaping of the hierarchical differentiation of formal and *pato* employees from the contract-based to working hour-based construction. Difference between formal and disguised *pato* employees does not lie in working hours since they work the same fixed hours as their formal counterparts. This means that, if disguised *pato* employees are included in the general category of *pato* employees, the shorter working hours of *pato* employees cannot be taken as the criterion which differentiates formal and *pato* employees. By excluding disguised *pato* employees, it is possible to construct *pato* employees as different and, therefore, inferior to formal employees based upon differences in their working hours. This legal exercise corresponds to a similar process which was

observed when managers in Shirahama constructed *pato* as being generally inferior to formal employees by referring to their shorter working hours and ignoring the existence of disguised *pato* (see Chapter 4). This discursive operation is important since the differentiation of employees based upon working hours creates an impression of being less discriminatory than the differentiation based upon contractual employment status, which is ultimately seen as management prerogative.

On the other hand, while defining *pato* employment based on shorter working hours under the PEL, the Ministry of Labour attempts to absorb as many as possible disguised *pato* in the category of *pato* employees by inventing the complex rules observed in Matsui's examples. This can be seen as an exercise aimed at bringing the maximum number of disguised *pato* into the category of *pato* employees under the PEL, who are constructed as inferior to formal employees based upon difference in shorter working hours, rather than leaving them in the category of informal employees who are also constructed as inferior, but based upon difference in contractual employment status. However, the manipulative aspect of this exercise is exposed here since *pato* employees covered by the PEL are constructed as inferior because of their shorter working hours, which is the very reason why disguised *pato* employees are excluded from the general category of *pato* employees.

Moreover, despite the attempt of the Ministry of Labour to categorise as many disguised *pato* as possible as *pato* employees covered by the PEL, there are still disguised *pato* employees who are left outside the scope of the PEL and there is a



remaining question about the legal position of these employees. There is a difference of opinion between the Government and employers concerning how these employees should be treated. As mentioned above, the PEL does not refer to such disguised *pato*, but the New Guidelines, which are issued by the Ministry of Labour arising from the requirements of the PEL, recommend employers to treat this category of employees as formal if they work a) largely the *same hours* and b) do largely the *same work* as their formal counterparts, although the problem is that the New Guidelines do not bind employers legally to do this. As demonstrated in the case study of the hotel industry in Shirahama (see Chapter 4), disguised *pato* employees are still treated less favourably despite the fact that they work as long as and perform the same jobs as their formal counterparts.

Masanobu Inaniwa, who is the head of legal affairs in the Nikkeiren (the Japan Federation of Employers' Associations), makes the following comment to justify the differentiation of disguised *pato* from formal employees.

This [disguised *pato*] is not a matter of *pato* employment whose characteristic is 'shorter working hours', but a question of *employment contracts*. In addition, it is *natural* to treat informal employees who are not under the life-time employment system differently from formal employees who are supposed to be covered by the system even if their patterns of employment are similar (Author's translation. Emphases added). (1993: 52)

This comment shows that employers consider that disguised *pato* are different from both genuine *pato* and formal employees and the difference between disguised *pato* and genuine *pato* rests mainly upon working hours, while that between disguised

*pato* and formal employees mainly derives from the employment contract. This means that the problem is reduced to management prerogative in offering different contracts to the different groups of workers and in differentiating them as those who are and who are not included in the life-time employment system.

This treatment of disguised *pato* highlights a dilemma which the Government faces. On the one hand, the Government needs to respond to the pressure from one constituency, *pato* women employees, who are demanding equal treatment to that of formal employees. Although the equal treatment of genuine *pato* is denied on the grounds of their perceived difference from those in formal employment (as will be discussed in the following sections), the Government cannot decisively decline the demands of disguised *pato* employees, since they cannot be decisively differentiated by a concrete material factor, such as working hours, but only on an arbitrary allocation of contracts.

Strong pressure is also exerted on the Government from another, more powerful, constituency, employers, who insist that it is not necessary to regulate *pato* employees, including both genuine and disguised categories, by legislation backed by penalties. In order to accommodate the demands from the two sides, the Government provided the above-mentioned New Guidelines which recommend employers without legal obligation to provide equal treatment for disguised *pato* employees who work the same hours and do the same job as their formal counterparts (Owaki, 1994: 8-11).

In one sense, the Government accepts the desirability of the equal treatment of disguised *pato* to formal employees and recommends this solution to employers although without enforcing it. However, the employers' resistance is strong since this reduces management discretion to allocate formal or (disguised) *pato* contracts to different groups of workers. Furthermore, this leads to the question of on what grounds, if not the number of working hours, management allocates inferior contractual employment status as *pato* to a certain group of workers, the majority of whom are women? The obvious difference between these and formal employees is the sex of participants, or the gendered domestic position of the workers in each category of employment. It is, therefore, necessary for employers and the Government to define disguised *pato* as different from both genuine *pato* and formal employees. On the one hand, the inclusion of disguised *pato* in the general *pato* category of employees breaks down the criterion of shorter working hours set out in the PEL, which is used to differentiate (genuine) *pato* from formal employees and to justify the less favourable treatment of (genuine) *pato* than formal employees. On the other hand, recategorizing disguised *pato* as formal employees would expose the lack of material differences between disguised and formal employees and the gender-specific differentiation of these employees.

Requirement of “Balance”

Having redefined *pato* employees and excluded disguised *pato* from its scope in Art. 2, the PEL sets out employers’ responsibilities for the *pato* employees covered by it in the next clause. Art. 3 reads:

Employers are obliged to make an effort to provide conditions under which *pato* employees can exhibit their ability to the full. This should be achieved by means of ensuring appropriate working conditions, providing training, promoting welfare and improving other elements in personnel management for them in consideration of the actual working condition of the *pato* employee concerned, the *balance* between them and formal employees, etc.  
(Emphasis added.) (Art. 3. PEL)

In order to understand the importance of the use of the particular term, “balance”, it is necessary to examine debates conducted in the Labour Committee of the Upper Diet. At that time the PEL was still a draft proposed by the Liberal Democratic Party (LDP) Government. There were extensive discussions over the concept of “balance” used in the PEL as the Government rejected the demand of opposition parties to replace it with the term “equality”. According to the record of debates of the Committee on 10th June 1993, the notion of “balance” was generated from the view that *pato* is different from formal employment in terms of both quantitative and qualitative aspects.

The Committee consisted of academics and members who represented the LDP, the opposition parties, the Ministry of Labour and labour unions. M. Kaneko, an academic advisor to the Committee, criticised the draft of the PEL as clearly showing the Government's policy of the denial of equal treatment in pay and other working conditions between *pato* and formal employees by using the word "balance" rather than "equality". In response to this critical view, an LDP MP claimed that the usage of "balance" instead of "equality" in the PEL would not worsen the current situation of *pato* workers because the term is usually used when the *same* treatment for *different things* is required, citing the usage of "balance" in other legislation (NCPM, 1993: 18).

K. Matsubara, a civil servant from the Women and Minors' Bureau in the Ministry of Labour, also explained the concept of "balance" in the Guidelines, which were used as the basis of the PEL as follows.

..... *pato* workers work shorter hours than formal employees but the difference between *pato* and formal employees is not only working hours. *In accompaniment of their shorter working hours, there are also differences in the content of work duty, the extent of responsibility, the possibility of job transfer and other elements. In many cases, the difference in these elements generates some substantive differences* [between *pato* and formal employees], not only quantitative ones. Therefore, this "balance" suggests that [employers] have to keep a balance taking all these aspects into consideration (Emphases added).

She continues:

.....the “balance” is for the things which are different. .... taking the substantive difference into consideration, prerequisites are different although it is necessary to attempt to establish treatment which is as equal as possible [between formal and *pato* employees] in total. (Author’s translation. Emphases added). (Reported in NCPM 1993: 19)

These arguments clearly show the term “balance” was intentionally adopted in the PEL on the grounds of the supposed quantitative and qualitative difference between *pato* and formal employment “in many cases”. This reveals the operation of the labour difference discourse, legitimising the less favourable treatment of *pato* employees by stipulating the requirement of not “equal” but ‘balanced’ treatment of them in the PEL. However, what Matsubara is saying in the first statement is that the shorter working hours of *pato* employment are usually accompanied by qualitative difference between formal and *pato* employment “in the content of work duty, the extent of responsibility, the possibility of job transfer and other elements”. This means that ‘qualitative’ difference originates from shorter working hours and cannot be corrected unless working hours are extended to full-time hours.

#### Lower Pay of *Pato* Employees

In the above Committee, the lower pay of *pato* compared with that of formal employees was also discussed. The Government emphasises that the pay gap simply reflects the qualitative difference between the two categories of employees. This position of the Government is clearly demonstrated when Matsubara comments on how the Ministry of Labour interprets an ILO proposal on the equal treatment of

part-time workers. The ILO sent a questionnaire to the governments of the member states in 1992, as part of a consultation aimed at concluding a general agreement on the equal treatment of part-time employees world-wide. This consultation document proposed to implement a *pro rata* principle for wages of part-time workers “without any discrimination originating from their shorter working hours”. Matsubara insists that:

We read the wording of “without any discrimination originated from their shorter working hours” as not denying differentiated treatments which originates from the difference generated from the elements other than working hours... (Author’s translation). (Reported in NCPM 1993: 19)

However, it is difficult to accept this assertion since shorter working hours and “qualitative” difference are not separated elements but are *en bloc* in the Government’s view as seen above. This means that Matsubara’s comment above is tantamount to the more straightforward assertion that *pato* employees are different from formal employees due to their shorter working hours. In dealing with the equality of *pato* employees, this position has led the Japanese Government and Japanese legislation to adopt an approach which is distinct from some other industrialised countries such as Britain and other EU member states. Especially in the British and EU context, as demonstrated in the previous chapter, the trend has been toward the equal treatment of part-time workers, such as pay on a *pro rata* basis, despite their shorter working hours (see Chapter 5).

Following the Committee's deliberations and more debates in the Diet, the PEL was eventually passed in 1993 without setting out any regulations in relation to pay, except, as seen above, urging employers generally to determine appropriate working conditions for *pato* employees, taking into account the "balance" between them and formal employees (Art .3, PEL). The New Guidelines issued by the Ministry of Labour alongside the PEL, refer a little more specifically to the matter of pay as follows.

Employers must make an effort to set wages, bonuses and severance payments for *pato* employees in consideration of *balance* between them and formal employees (Author's translation; Emphasis added). (Rule 1 (6), Section Two, the New Guideline)

Here the principle of "balance" is repeated and there is no implication of "equal" treatment of *pato* employees in pay. It would, therefore, be justifiable for employers to pay *pato* employees at a lower rate than formal employees, thereby ignoring the *pro rata* principle suggested by the ILO. Although the Ministry of Labour insists that formal and *pato* employees should be treated "as equally as possible" (see the second comment made by Matsubara above), it denies in principle equal pay between *pato* and formal employees and this denial was made possible by adopting the labour difference discourse, highlighting the shorter working hours of *pato* employees. The Ministry, then, denies any inconsistency with the ILO proposal insisting that *pato* employees are paid less, not only because of their shorter working hours directly but also because of qualitative differences which derive from it.



## Working Hours

As seen above, the shorter working hours of *pato* employees are the key determinant in differentiating them from formal employees in the PEL. However, as demonstrated in Chapters 3 and 4, *pato* employees in Japan work much longer hours than their British counterparts and, indeed, many *pato* employees work close to full-time hours. This fact is actually recognised in the New Guidelines. As mentioned above, the PEL does not specify any precise working conditions for *pato* employees but leaves various matters to be dealt with by the Ministry of Labour. The working arrangement of *pato* employees such as days and hours, is also one of those matters. Rule(3), Section Two in the New Guidelines reads:

- i) Employers must endeavour to consider fully the circumstances of *pato* employees when deciding or changing their working hours and days.
- ii) Employers must endeavour *not to use pato employees over their fixed working hours or on days which are not their usual working days*.
- iii) Employers must endeavour to show clearly *whether and to what extent pato employees are required to work over their fixed hours or on days which are not their usual working days in the event that there is an exceptional need to do so* (Author's translation. Emphases added).

The Ministry of Labour explains that these administrative rules were made to protect the interests of *pato* employees by leading employers to recognise that “*pato* employees should not be made to work over the fixed hours or days” as many of them “take their jobs because of the shorter working hours and/or certain period of hours in a day which suit *their own circumstance in order to combine waged work*

*and family life*”(Author’s translation, Matsui, 1993:14). This comment and the above rule suggest the existence of *pato* employees who are made to work beyond their fixed working hours and even days to the extent that the New Guidelines have to urge employers to alter the practice. This questions the justification of the less favourable treatment of *pato* employees on the basis of their shorter working hours and alleged qualitative inferiority.

Moreover, the above comment made by Matsui exposes the gendered nature of *pato* employment which is hidden by the labour difference discourse in the official argument. As Matsui comments, shorter working hours are the primary factor used by those who insist that *pato* employees are not discriminated against to any greater extent than formal employees. This is, according to them, because many of them are housewives who wish to combine waged work with domestic commitments, and engagement in *pato* employment is their choice. Making this point, the labour difference and gender difference discourses appear together as will be discussed further in the next section.

To summarise this section, while *pato* employees are redefined in terms of their shorter working hours in the PEL, the arguments of the general inferiority of *pato* employees are reasserted in terms of their quantitative and qualitative differences. Then, equality between formal and *pato* employees is rejected on the basis of these constructed differences between the two forms of employment. This means that the hierarchical division based upon the labour difference discourse has been reshaped and reinforced by the introduction of the PEL, which purports to improve the

position of *pato* employees, but requires employers only to provide, not equal, but “balanced” working conditions for them. This legal treatment underlines the difference and inferiority of *pato* employees, reinforcing the labour difference discourse and the hierarchy between formal and *pato* employees.

#### 4. The Gender Difference Discourse: Gendering the Hierarchy

##### The Law on Part-time Employees 1993

The previous two sections identified the labour difference discourse adopted by the court under the LSL and in the PEL, which has created and reinforced the hierarchy of employees in the Japanese legal scene. Under the labour difference discourse, sex inequality is obscured in treating *pato* employees less favourably since this treatment is legitimised by the constructed different and inferior quality of *pato* in relation to formal employees in terms of labour-related factors. However, the gender-specificity of *pato* employment is highlighted by the PEL and the thinly veiled gender difference discourse has been revealed in the debates about *pato* employment generated at the time of the introduction of the PEL.

Here I analyse the gender-specific composition of the PEL and its denial of equal treatment to *pato* employees indicated at the very beginning of the PEL in Art. 1 which states the objective of this legislation as promoting “welfare” of *pato* employees. The term “welfare” used in employment-related legislation means the general well-being of workers, in the case of PEL that of *pato* employees, including not only social security but also such aspects as better working terms and conditions and training. Through the analysis of this wording of the PEL, I will demonstrate that gender is an important factor which determines the “balanced” treatment of *pato* employees required in the PEL as discussed in Section 3 of this chapter.

I then examine arguments presented in the legislative and other public fora by an official of the Ministry of Labour, an academic and a lawyer at the time of the introduction of the PEL. In doing this, I identify the gender difference discourse introduced by them into the discussion of *pato* employment in the Japanese legal regime. The gender difference discourse appears in the Japanese legal scene in a way that complements the labour difference discourse in constructing the hierarchy of employees in the law. This is a marked difference from the British legal context where the gender difference discourse was brought into the discussion of part-time employment under the sexual equality initiative in order to challenge the hierarchy. I will show that the introduction of the PEL has contributed to the incorporation of gender into the legal hierarchy of employees, and to the creation of the hierarchical as well as gendered differentiation of employees at work.

### *Gender-specific Law*

As mentioned earlier in this chapter, the PEL of 1993 is one of the four new acts, alongside the Equal Employment Opportunity Law (EEOL) 1985, the Law on Dispatched Workers (DWL) 1985, and the Law on Leave from Work for Child Care (LWCCCL) 1992, which were introduced exclusively or primarily with women employees in mind. The EEOL applies exclusively to women in order to promote sexual equality at work (Art. 1 in the EEOL). This means that the EEOL is not concerned directly with whether or not men receive equal treatment with women employees (Sugeno, 1994: 124, 298) although, if men do not, they could mount a

challenge under the Civil Law or the Constitution of Japan as women did prior to the introduction of the EEOL (see Section 2 of this chapter).

On the other hand, the DWL and the PEL regulate “temps” and “*pato* employees” irrespective of the sex of these workers and the LWCCL provides ‘parental’ leave for caring for infants up to one year of age. However, these three statutes affect more women than men as the great majority of temps and *pato* workers are women as is the great majority of the claimants of parental leave. The Government conducted a survey after the introduction of the LWCCL by sending a questionnaire to listed companies, asking whether or not they implemented the parental leave system and how many employees took such leave between 1st April and 30th September 1992. 1205 companies responded and 90.4 per cent of the companies had implemented the leave system. Amongst these companies 3,131 employees in total were on such leave. However, only 5 of them were men, that is mere 0.16 per cent of parental leave claimants (PMO, 1994: 76). This can be explained partly by the lack of financial support since the LWCCL provides one year unpaid leave. Since husbands usually earn more than wives, it is wives who usually take the leave in consideration of the financial implications for their family income. The sex-specific orientation of these statutes is also revealed by the fact that the PEL and the LWCCL are both designed through initiatives of the Bureau of Women and Minors in the Ministry of Labour. This illustrates that these pieces of legislation are designed primarily with women employees in mind in spite of their gender-neutral terminology and the emphasis on their applicability to both men and women.

More importantly, all four sex-specific statutes share the following three characteristics. The first is the emphasis on “*fukushi* - welfare”. Indeed, the EEOL evolved from the Law on Welfare for Working Women of 1972 (Asakura, 1985: 21) and its official title retains the term “*fukushi*” - “*Koyo no bunya niokeru danjo no kinto na kikai oyobi taigu no kakuho to josei rodosha no fukushi no zoshin nikansuru horitsu* - the Law on Securing Equal Opportunity and Treatment between Man and Women, and the Promotion of *Welfare* for Women Workers in the Area of Employment”. The promotion of welfare is a recurrent theme in all the four pieces of legislation primarily targeting women workers and the term appears at the first article of each legislation which declares the objective of the legislation (Art.1, EEOL; Art. 1, DWL; Art. 1, PEL; and Art. 1, LWCCL). For example, Art. 1 in the PEL reads.

This law, taking into consideration the important role which *pato* workers play in our national economy, aims to assist them in displaying their ability fully and to promote their *welfare* through securing *proper* working conditions, education and training, improving social security and measures to improve other elements in personnel management for them, and taking steps to develop and improve their occupational capacity. (Emphases added. Author’s Translation)

“Welfare” is also emphasised repeatedly in the section on protection of women and minors in the LSL (Arts. 56-ii, 64-2-iii, and 64-3-ii, LSL). However, although it also appears in the main body of the LSL and the Minimum Wages Law (MWL), the promotion of welfare for workers is not elevated as the main objective of these

pieces of legislation. The term welfare does *not* appear in Chapter 1 or Art. 1, which lay down the basic principles of the legislation in the LSL and the MWL as seen in the four new pieces of legislation for women, suggesting that the idea of welfare is less important in the LSL and the MWL.

Although the main body of LSL and MWL do not explicitly exclude women employees from their scope, it can be said that these laws were mainly designed bearing in mind formal male employees, rather than women, so that the emphasis on welfare is less obvious in them. These statutes were introduced in the early post-war period - the LSL in 1947 and the MWL in 1959 - when the majority of women workers were still family workers and self-employed in the agricultural sector or small family businesses rather than industrial workers (Ito, 1992: 231). According to the Labour Force Survey in 1960, while 54.5 per cent of all women of 15 years of age and over participated in the labour market, 43 per cent and 16 per cent of all women workers were classified as family workers and self-employed respectively and the remaining 41 per cent were employees (ML, White Paper on Labour, 1992: 333). At that time these women employees were largely viewed as being in a transient state before marriage and, indeed, about two thirds of women workers in the 1960s were under 30 years of age (Kawahigashi, 1991:80). Under these circumstances, women workers were not a priority in legal concerns except for some health and safety related restrictions justified in the name of protecting their future motherhood (see note 2).



A more recent example of the use of “welfare” in legislation, which is intended primarily to apply to male workers, can be found in the Temporary Law on Promoting Shorter Working Hours (the TPSWHL) of 1992. Although the LSL sets out 40 maximum working hours per week for both men and women, this can be extended if unions or the majority of employees agree with employers to overtime working (Art.36). However, there has been statutory restriction about the overtime working of women (Art. 64, LSL) whereas no such restrictions exist for men. This shows that the primary concern of the TPSWHL is male employees although the term used is the sex-neutral ‘workers’ because it is primarily men’s working hours, especially their overtime working, which were thought to be legally controlled. In the TPSWHL, a reference to “welfare” appears not in the first article but in Chapter 5 with the Government’s responsibility to set up an institution to assist in the shortening of working hours in the workplace, showing that much less importance is attached to welfare in this piece of legislation compared to the EEOL, DWL, LWCCCL and PEL.

These examples demonstrate that welfare is given much less emphasis in legislation primarily aimed at male employees, while in contrast, in the legislation primarily for women, the promotion of “welfare” is elevated as a leading objective, appearing at the very beginning in Art. 1 and setting out a more paternalistic stance in regulating women (and minors). It should be noted, however, that welfare is often associated with the long-portrayed image of women as the weaker sex in the law, implying that the law bestows favours on women despite (or because of) their *inferiority* to men. The same idea can be extended to the promotion of welfare for *pato* employees and

temps (the majority of whom are women) who are inferior to formal employees (the majority of whom are men).

What is happening here is that if the two groups of people - whether men and women, or formal and *pato* employees - are not considered as equals, the improvement of the situation of the 'inferior' group is advocated on a basis of "welfare" rather than of equality. This underlying idea is reflected in the law, which diverts the demand for equal treatment by pledging to make proportionate improvement for the inferior group. For example, as discussed in Section 3, the PEL advocates the securing of "proper" (in the above quoted Art.1) or "balanced" (Art.3, see Section 3 of this Chapter) working conditions for *pato* employees by encouraging employers to improve management practices. However, terms such as "proper" or "balanced" are not the same as "equal" treatment of *pato* and formal employees. Rather, these suggest the inferiority of *pato* employees, which is a prerequisite for advocating "welfare", and "proper" or "balanced" treatment of such employees. Moreover, the association of this term, "welfare", is very much gender-specific in the law, implying that the inferiority of *pato* employees suggested by this term is gender-biased.

The second common characteristic of the EEOL, the DWL, the LWCCCL and the PEL is their relative ineffectiveness in practical terms in relation to their stated objectives. The main reason for this is the lack of practical means for enforcing their provisions. The EEOL is particularly criticised as inadequate because it only contains exhortatory provisions and prohibitory clauses without penalty (for

example, see Lam, 1992). Some merely exhort employers to comply with requirements, which do not bind them at all and have no legal effect whatsoever. The others prohibit employers to take or not to take certain action, but there are no criminal penalties against the violation of these provisions. It should be noted, however, that the violation of prohibitory provisions is illegal and, therefore, may constitute a tort under the Civil Law with the proof of detriment to women employees involved (Art. 709, Civil Law) based on which they may be able to seek compensation (Sugeno, 1994: 127). However, the PEL does not contain even prohibitory provisions without penalty but only exhortations to employers to comply, demonstrating that it is of even less practical use than the EEOL. The lack of appropriate measures of implementation means that the demands of *pato* employees for the improvement of their position at work have been heavily diluted in the process of law-making in favour of the maintenance of the benefit of employers and of formal employees.

The third common characteristic is the additional rules stipulated in all these four pieces of legislation, which promise the re-examination of the legislation, leading to amendment if necessary in the near future (Supplement 20, in the EEOL; Supplement 4, in the DWL; supplement 3, in the LWCCL; and Supplement 2, in the PEL). For example, in the PEL, Supplement rule 2 states:

The Government is required to re-assess the situation of the implementation of the provisions in this law ..... Then, if necessary, the Government will discuss the provisions in this law and take necessary actions based on the discussion (Author's translation). (Supplement 2, PEL)

These amendment clauses were often only concessions given by the LDP Government to the opposition parties who supported more radical legal change during debates in the Diet. However, some commentators read this in a positive way. For example, given the manner in which it looks to further change in the future, the legislation should not be considered as being completed; rather, it should be seen as a developing piece of legislation (Asakura, 1985: 23, 24). As a progressive example of how this might work, Art. 28 in the EEOL of 1985 was repealed by the LWCCCL of 1992. While the former exhorted employers to allow only women to take leave to care for infants and/or very young children, the latter prohibits employers from rejecting requests from either men or women employees to take such leave from work to care for children under one year of age. However, the amendment rules stipulated in these four pieces of legislation can be seen as the recognition of the inadequacy of these pieces of legislation to achieve the aims set out in them at the very beginning of their introduction, reflecting the relatively weak bargaining power of women workers in comparison to the other parties involved, in the codification of their interests in the statutes.

### *Gendering Pato Employment*

Prior to the introduction of the PEL, public fora for discussion of the issues associated with it, were set up. One of these was an official meeting held in the Diet. In this meeting, Akira Takanashi, the head of the Study Group on part-time employment set up by the Government, expressed his view on women and *pato*

employment, underlining the gendered differentiation of *pato* employment as follows:

Many Japanese women *choose to stay at home during the period of child-rearing*. But the *pato* labour market is open to those who had a career break to stay at home once.... The proper development of the *pato* labour market is one of the most important strategies *to harmonise family life and working life in order to raise the status of women* (Author's translation. Emphases added). (The Record of Debates in Diet, 27th April 1993:13)

This statement clearly implies that the formal labour market is not open to women who have taken a career break. Takanashi also commented on this point in a public discussion meeting on *pato* employment and the introduction of related legislation held by a leading legal journal. He stated that:

*It is easier to participate in the pato labour market [than in the formal labour market] as this is the discontinued labour market irrespective of [workers wanting to work] short-time or full-time*. This can be relatively *freely chosen*. ..... It is difficult to say that these [the lower wages of *pato* employees etc.] are discrimination. I personally think that these are distinction (Author's translation. Emphases added). (Jurist, 1993: 24-25)

These comments of Takanashi suggest the three important points. Firstly, in his mind it is women's choice "to stay home during the period of child-rearing" as well as to re-enter the labour market afterward as *pato* employees. Secondly, he differentiates all women returners *irrespective of their working full-time or part-time hours* as discontinued workers in contrast to those who do not have any career

break. This is the key idea in understanding the discriminatory treatment of disguised *pato* employees on the grounds that these women *have chosen to discontinue* their employment. Thirdly, the *pato* labour market is seen as an easier segment of the labour market for a woman returner to re-enter, suggesting that the formal segment is closed to them.

Here I should like to pay particular attention to the first point. Takanashi is not the only one who emphasises women's choice to stay at home and return to the labour market as *pato* employees in the above discussion meeting. He received strong support from another participating lawyer, Atsushi Kiyoie who gave a more straightforward insistence on this matter in the same meeting staged by the journal.

*If housewives wish to work full-time, they can do so by giving up family commitment.* If the number of *pato* workers has been increasing because they [housewives] *choose* to combine waged work and family, it is *unnecessary to treat only these pato employees in a particularly favourable way* (Author's translation. Emphases added). (Jurist, 1993: 26)

In these statements, it is clear that *pato* employment is viewed as the working pattern of "housewives" who exercise their freedom of choice in full: freedom to take domestic responsibility and freedom to be employed on a *pato* and inferior basis. However, there is no consideration of the consequences of women not exercising these freedoms nor the advantages enjoyed by employers and male workers. Mari Osawa criticises Kiyoie, pointing out that, if wives work on a "full-time" basis and give up their family commitment, the Japanese family would not

function (1994: 50). The evidence presented in Chapter 3 of this study supports Osawa's claim since Japanese husbands take very little domestic responsibility (see Chapter 3). Chizuko Ueno also claims that under current economic circumstances, women do not have a choice in the question of whether to give up participating in some form of waged work, such as *pato* employment. According to Ueno, the fulfilment of the ever rising expectation of the average living standard is making increasingly insufficient to support all the family needs by the income of one person (husbands) (1990: 208-229).

These critics correctly suggest that the discourses based upon the gendered domestic position of women as wives and mothers, and women's choice disguise the current situation of many Japanese women in the labour market as well in the family. It creates an impression that women make informed choices based on the freedom guaranteed by the law and that they make these choices as equals in the context of their relationship to employers and to men. My point here is not to deny the existence of some women who are in a relatively unconstrained position and can choose whether and how they participate in the labour market but to emphasise that it is not appropriate to highlight the freedom of women without considering the imbalance in the power relations between employers and women employees, and between men and women.

Employers also exercise their freedom in providing poorer working conditions for *pato* women employees as this is in principle a matter of negotiation between them. Although the conclusion of employment contract is in theory a matter of negotiation

between employers and employees, in the case of *pato* women employees in Shirahama, for example, the rate of wages for *pato* employees is decided by companies mainly according to the average local rate and other economic factors. There was not a single instance in which *pato* women employees themselves negotiated their wages. Furthermore, *pato* employees have much less flexibility than is suggested by the above commentators in choosing their working days or hours since employers need them on specified days and at specific times according to fluctuations in business as shown in Chapter 4. This suggests that while women in reality exercise little freedom even in choosing their working hours, employers are able to make full use of their power to set different terms and conditions of employment, supported by one of the most important legal principles - the freedom of contract.

Under these circumstances, emphasis on women's choice can be best understood as forming a part of the gender difference discourse which is generated from and reflects and reinforces the current unbalanced power relations between the sexes and between employers and women employees. This is particularly so when this discourse is used in conjunction with the labour difference discourse in highlighting the inferiority of *pato* employees. While the labour difference discourse constructs the inferiority of *pato* employment on labour-related grounds, the gender difference discourse presupposes that women voluntarily take domestic responsibility as wives and mothers at home and make an informed choice to be *pato* employees in the labour market. This means that "women's choice" to be *pato* employees entails not only shorter working hours but also inferior terms and conditions. The two



discourses, the labour difference and the gender difference discourses, complement each other and legitimise the less favourable treatment of *pato* employees on the basis of women's consent and obscure the significance of structural sexual inequality in *pato* employment.

## Conclusion

This chapter analysed how *pato* employment was constructed and treated in the Japanese legal institutions. The labour difference discourse has set the scene under the framework of the LSL 1947, creating the hierarchy of employees based upon the different and inferior quality of *pato* employees in terms of labour-related factors and legitimising the differentiated treatment of employees based upon contractual employment status. Then, the introduction of the PEL has reshaped and reinforced the hierarchy between formal and *pato* employees by setting out the gender neutral criterion of working hours. This constitutes the redefining of *pato* employment through the exclusion of disguised *pato* from the category of *pato* employees, refocusing an element of the labour difference discourse, difference in working hours and qualitative inferiority of *pato* employees which derives from their shorter working hours. This has recreated the impression that it is the inferiority of *pato* employees which legitimises the less favourable treatment of them, whereas in fact it is difficult to identify such inferiority in many cases in terms of job content, responsibility and commitment between formal and *pato* employees. Furthermore, the hierarchy of employees based upon the labour difference discourse is complemented by the gender difference discourse which was introduced with the PEL. It highlights the gendered domestic position of women as wives and mothers and their voluntary participation in both domestic work and *pato* employment. Here the hierarchical as well as gendered differentiation of employees appears in the Japanese legal institutions.

Moreover, unlike the case of part-time employment in Britain, *pato* employment in Japan was not (and still is not in practice) a pattern of employment based on shorter working hours as defined in the PEL. Rather, it is a typical pattern of informal employment based on gender. Although the labour difference discourse together with the insistence on women's choice obscures the sexual inequality surrounding *pato* employment, *pato* employment is indeed gendered and is built upon a particular assumption of women's gendered domestic position as wives and mothers. In this sense, the law is a part of the system to draw more women into *pato* employment which is constructed as inferior, while enabling employers to exclude from privileged formal employment women who have taken a break for family reasons and hence to reserve formal employment for men. This shows how the law, through the creation of the gendered and hierarchical division of employees, contributes to the creation and maintenance of both the privileged position of men in the labour market and the allocation of domestic labour to women, each of which supports the other in producing inequality between men and women.

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<sup>1</sup> The MWL is also an important piece of legislation which provides general protection for workers. Although there are many criticisms concerning the level of minimum wages set out by this law as being too low to bring an actual improvement to the level of wages (Tsuda, 1991), the significance of the legal mechanism which provides the safety net for low-paid workers cannot be ignored. In particular, informal employees, such as *pato* employees, are more likely than formal employees to benefit from this kind of legal protection. The MWL, however, concerns the enforcement of minimum wages for all workers, but not equal pay amongst them, which is dealt in the LSL.

<sup>2</sup> There are various protections in relation to women's motherhood irrespective of working hours or the length of employment in the LSL. Maternity leave is set out under Art. 65 of the LSL. In 1985 the period of statutory maternity leave was extended from six weeks before and after the birth to six weeks before and eight weeks after the birth. The LSL lays down a compulsory maternity leave after the birth, which was also extended from five weeks to six weeks. In this amendment an element was added to allow women to claim a longer maternity period of up to ten weeks before childbirth in the case of multiple pregnancy. The National Health Insurance guarantees three different kinds of payment related to child-birth to women workers who have contributed to it while they were employed. A lump sum will be paid to a woman to cover the cost of delivery in the amount of either half of her standard salary or the minimum guaranteed rate of ¥240,000 (£1,500), whichever is the higher. During the period of this maternity leave, 42 days (six weeks) or 70 days (10 weeks) in case of multiple pregnancy before and 56 days (eight weeks) after the birth, women will receive maternity pay of 60 per cent of the standard salary. In addition, she will receive a lump sum of ¥2,000 (£12.50) per child if she herself is going to continue rearing the baby (ML, WB, 1993: 91). After the end of this statutory maternity leave she can claim unpaid leave from work until her child becomes one year of age under the LWCCCL of 1991.

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The LSL also provides other provisions for women, such as the right to claim days off from work during menstruation if it makes it difficult for them to pursue their work, and the right for women who have a child or children under one year of age to claim time off from work to take care of them at least twice a day and one of these periods has to be of more than thirty minutes. This is mainly for feeding babies but not exclusively so. The time off can be claimed at the beginning and at the end of work hours so that women can in practice shorten their working hours (Sugeno, 1994:294-295, Hashizume, 1992:150). This is based on the full-time employment of eight hours and *pato* women employees can claim time-off proportionately for this purpose (Sugeno, 1994: 294). These rights do not entail guaranteed payment and are left to negotiation and agreement between employer and employee and can only be taken by women employees.

<sup>3</sup> In 1994 two more cases claiming equal pay were brought by *pato* women employees (Owaki, 1994: 4).

<sup>4</sup> The Civil Law grants employers a comprehensive right to dismiss employees (Art.627-1). This is, however, severely restricted by the LSL and rules established by the court.

<sup>5</sup> The Supreme Court confirmed these two prerequisites in two cases. First, it established the necessity of objective reasons for employers to dismiss employees and without it the dismissal is considered as employers' abuse of the right of dismissal. It states that "(t)he exercise of the right for employers to dismiss employees can be an abuse of the right and be void in the case that the dismissal cannot be considered as appropriate according to common sense in society because of the lack of objective justifiable reasons" (*Nihon-Shokuen Case* (1975] Minshu 29/4/456). Secondly, the Supreme Court emphasised that even if there is an objective reason to dismiss employees, the dismissal must be considered as an appropriate measure to take. This rule was established in another case where an employee, a radio announcer, was dismissed on a disciplinary basis because he had missed his early morning programme twice in a particular week. Although the Supreme Court found that there was an objective reason which might lead to dismissal, it decided that it

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was too severe to dismiss the employee and, therefore, dismissal was inappropriate in this particular cases (*Kochi-Hoso Case*, [1977] Rohan 268/17).

<sup>6</sup> In addition, Oda's understanding of the working life of male workers need to be questioned. He insists that "a majority of people", that is men, "work in the same company after finishing school and remain there until retirement". However, it is pointed out that male workers, particularly young blue-collar workers in medium and small sized companies in Japan move between companies although much fewer times than workers in the United States and some other Western countries and, therefore, they tend to stay within the same company longer than their counterparts in these countries (Koike, 1988: 57-66, 115-179, Hashimoto and Raisian, 1985). This casts doubt on the prevalence of such a pure form of life-time employment as Oda describes, from the completion of formal education to retirement, except for a relatively small number of male university graduates who find jobs in large firms.

<sup>7</sup> 61.2 per cent had non-fixed term contracts. Others were those who either had contracts until the accomplishment of a specific project (1.6 per cent) or who answered that they did not know (3.4 per cent).

<sup>8</sup> There is, however, an important case brought by a male employee with a fixed-term contract. The Supreme Court delivered a decision in 1986 regarding the termination of a fixed-term contract of a male employee which took place in 1971 (*Hitachi-Medico Case* [1987] Rohan 486/6). In this case the employee had concluded a fixed-term contract of two months and it was renewed five times before the company terminated it on economic grounds. The decision delivered was in favour of the company.

## CHAPTER 7: CONCLUSION

At the outset of this study, the following research questions were raised. Despite the increase of women's participation in paid work in the form of part-time/*pato* employees and various attempts to improve the position of these women employees through legal channels, first, why have part-time/*pato* women employees nevertheless been marginalised and disadvantaged; second, why are these women concentrated in lower-paid and lower-graded jobs in the labour market; and, third, why is it still largely women who are expected to carry domestic responsibility in Britain and Japan? In order to answer these questions, this study has analysed the relationship between the legal construction and the disadvantaged position of part-time/*pato* women employees, focusing upon the discursive process which legitimises the less favourable treatment of these women at work in Britain and Japan. Through this analysis, I argue that the three questions raised above are closely related to one another and to the discursive construction of full-time/formal and part-time/*pato* employment in a gendered and hierarchical manner.

## **1. The Discursive Operation of the Law**

In examining discourses surrounding the part-time/*pato* employment of women, I applied to this area an analytical framework which was developed by Smart and Olsen mainly in the sexuality-related criminal law fields, such as rape, pornography and violence against women. Smart argues that the law is one of the most powerful discursive mechanisms of gendering in society which produces and reproduces the gendered subject position of women. Olsen claims that the law creates, and operates within, the hierarchical positioning of gender. Combining their analytical approaches, this study has conceptualised the law as one of the key discursive mechanisms of hierarchical gendering which contributes to the production and reproduction of unequal power relations between the sexes.

The contribution of my work to the existing body of legal studies lies in this application of Smart's and Olsen's analytical framework of the law as a discursive mechanism, to the field of employment law where emphasis has hitherto been placed largely upon the exploration of structural problems in terms of policies and regulations, rather than upon the examination of the discursive operation of the law. My study, however, has demonstrated the crucial importance of the analysis of legal discourses in this field since this illuminates the close relationship between the discursive construction of the gendered hierarchy of employees and the legitimisation of the less favourable treatment of women in part-time/*pato* employment based upon such a hierarchy.



In applying Smart's and Olsen's mode of legal analysis to the field of employment law, my study has identified the limitations of this approach and the necessity of modifying it appropriately to the specific context of women's employment. First, the discursive operation of the law in this area is deeply tied to and interacts with structural and social factors, that is the ways in which the labour market, the family and the law are organised built upon unequal power relations not only between the sexes but also between employers and employees, and, therefore, the discursive and structural elements cannot be separated from each other. As a result, it becomes clear that Smart's and Olsen's framework, which focuses primarily upon the discursive operation of the law in relation to gender, needs to be developed in a way which incorporates the complex interactivity of discursive and structural formations, and gender and economic power relations, into the analyses of the law in the area of employment.

Second, although Smart and Olsen recognise to some extent the importance of the interactive operation of discourses, their analyses more or less focus upon the legal discourse, rather than the relationship between this and discourses produced outside the legal regime. By adopting a more explicitly interdisciplinary approach, my work has demonstrated that the examination of legal discourse alone is not sufficient to understand the discursive construction of the gendered hierarchy of employees since discursive power operates within and across employment and legal institutions in constructing the difference and inferiority of part-time/*pato* employment. This means that the examination of the law in terms of its discursive power needs to be conducted in the context of an analytical framework which explicitly encompasses

the operation of discourses in closely related non-legal regimes, focusing upon the interactive discursive process between the law and society.

Through the examination of employment and legal institutions, I have identified two key discourses, the labour difference discourse and gender difference discourse, which operate within and across these institutions, constructing the difference and inferiority of part-time/*pato* employment and workers in it on labour-related and gender-related grounds respectively. These two discourses consist of three distinctive sets of constructions which can be pinpointed in both legal and employment contexts, and the combination of these three elements of construction makes it possible to establish the gendered hierarchy of employees. The first of these is the construction of the gendered positions of men and women in both family and labour market such that women are constructed as wives and mothers who are responsible primarily for domestic work and, therefore, as deviant workers in the labour market, whereas men are constructed as fathers who are responsible for providing for their families financially and, therefore, “proper” workers in the labour market. The second is the construction of full-time/formal and part-time/*pato* employment such that these pattern of employment are gendered with full-time work produced as largely men’s and normalised as the standard and, therefore, superior working pattern, while part-time/*pato* work is simultaneously constructed as predominantly women’s, and as an atypical and therefore, inferior, working pattern. These two sets of construction of men and women, and full-time/formal and part-time/*pato* employment involve a two stage process by first establishing the difference between these binary oppositions and secondly positioning them

hierarchically to each other. The third construction is that of women's consent to their own disadvantaged position at work and at home, producing women as "responsible" for their own discrimination and obscuring or absolving the responsibility of the law, employers and men for the reproduction of gendered power relations in employment and the family. The implications of these three constructions are outlined below.

### *The Construction of Women - Wives, Mothers, and Part-time/Pato Workers*

While the legal discourse constructs positive models of men as independent persons functioning in the public sphere, it creates another of women acting primarily in the private sphere. Naffine claims that the "good woman" envisaged in Anglo-American law is "a faithful wife and mother whose sphere is the home, not the competitive arena of the marketplace (Emphasis added)." (1990: 137). Similarly, in Japan, Noriko Mizuno (1985) has pointed out through the investigation of family law the existence and strong reinforcement of the ideological construction of women to be good wives and mothers.

While women are defined primarily in this way, in the role of providing care for their families, men are expected to fulfil the role of providers, to be waged workers and, as a result men are seen and treated by the law as the "standard" for workers. Peggy Kahn claims in relation to British labour law that:

..... much employment law and many collective agreements are predicated upon *the male worker*, a worker *with few domestic responsibilities in full-time employment* ..... (Emphases added). (1985: 79)

Similar criticisms have been made against the labour law in Japan as regards men as standard workers (Takenaka, 1985: 70). These gendered domestic positions of both sexes are reflected in the construction of women in the labour market as deviant and, therefore, inferior workers who carry domestic responsibility in opposition to the construction of men as the standard, and therefore, superior workers who are free from domestic work.

Here, particular attention should be paid to the contribution of these different constructions of men and women in both private and market spheres to the shaping and maintenance of the sexual division of labour at home, that is the allocation of domestic work to women, and the combined effect of this division and the emergence of part-time/*pato* employment of women amongst women. This study underlines the crucial importance of the gendered domestic position of women in part-time/*pato* employment as wives and mothers in contrast to that of men in full-time/formal employment as the primarily earners in the family. This means that, although a large number of women with families have been drawn into waged work as part-time/*pato* employees, this trend has not challenged or altered the gendered domestic positions of men and women; rather it is built upon these gendered positions of the sexes. The legal discourse has contributed to the reconstruction of women's subjectivity as mothers and wives as well as part-time/*pato*, that is inferior, workers by constructing the gendered hierarchy between full-time/formal

and part-time/*pato* employment. The effect of the specific construction of women and the gendered hierarchy of employment patterns is that a large number of women's labour time is literally divided into domestic and waged work through part-time/*pato* employment without disturbing either men's identity as "proper" and superior waged workers, or the unequal allocation of domestic work to women.

### *The Construction of Full-time/Formal and Part-time/Pato Employment*

While the legal discourse contributes to the creation of the specific gendered subjectivity of men and women, it also supports the gendering and hierarchical positioning of binary concepts such as full-time/formal and part-time/*pato* employment. Gillian More (1993) argues that

..... part-time work, work performed overwhelmingly by women, is generally perceived to be different from full-time work, and as such, is often conferred with fewer rights than full-time work. (1993: 49)

This suggests that full-time work is given a masculine and part-time work a feminine identification. The hierarchical value of these working patterns is expressed in the law most clearly in the form of the lesser levels of rights and protections provided for part-time employees.

My analysis also shows that, although gender ostensibly disappears in the labour difference discourse, the gender specific differentiation can be seen in the gendered identification of part-time/*pato* employment and the construction of the inferior value of this pattern of employment based upon the gendered domestic position of

the employees in it. As a result part-time/*pato* women employees are granted proportionally fewer rights and protections in comparison to those in full-time/formal employment by the legislation and adjudicative institutions according to the degree of difference exhibited by them from full-time/formal employees. This treatment is legitimised by the constructed different and lesser value of part-time/*pato* in comparison to full-time/formal employment while the differentiated treatment in the law, in turn, reinforces the constructed different and lesser value of part-time/*pato* employees. Moreover, non-standard working patterns, including part-time/*pato* work, are measured against full-time/formal employment, elevating this as the norm by which others should be measured. This privileged position of full-time/formal employment in the law normalises men's employment pattern and, by doing so, constructs women's employment patterns, especially part-time/*pato* employment, as abnormal.

### *The Construction of Women's Choice*

In parallel to the legitimisation of the inferiority of part-time/*pato* employment, another construction exists which attributes the great concentration of women in part-time/*pato* employment to women's choice rather than the structures of the labour market and the family. It underlines that it is women who 'choose' this pattern of employment which is different from the standard working pattern. In legal terms this is interpreted as women exercising their 'freedom of choice'. If women freely enter into this particular type of employment contract, there is no necessity to provide legal intervention to equalise the gap between them and full-

time/formal employees, in so far as there is no breach of basic employment regulations, such as those relating to health and safety, and minimum wages (in Japan). This view is often put forward by the British and Japanese Governments and by employers alongside the claim of difference between full-time/formal and part-time/*pato* employment and the inferiority of the latter, which they perceive as legitimising the less favourable treatment of part-time/*pato* employees.

So, the argument of supposed women's choice is an essential component which complements the construction of the inferiority of part-time/*pato* employment. This is because, while creating the hierarchical and gendered differentiation of employees, it emphasises that a group of workers, women with families, are not forced into this pattern of employment but voluntarily 'choose' it. In doing so, this argument highlights the consent of both employers and women workers to the inferior terms and conditions of part-time/*pato* employment. This obscures the power imbalance between employers and employees and the structural constraints which women face, including the unequal distribution of work between the sexes in the domestic sphere and discrimination at work. By claiming women's own choice, the blame for the disadvantaged position of these women is shifted back to themselves, rather than the failure of governmental policies, legal regulations and/or discrimination at the workplace.

The above three constructions in the British and Japanese legal scene have contributed to bringing about the gendered hierarchy of employees. The effect of

this hierarchy is to legitimise, first, the marginalisation of part-time/*pato* employees based upon the construction of the inferior value of part-time/*pato* employment and the employees in this pattern of employment, second, the concentration of women in lower-paid and lower graded jobs by constructing the inferior value of women's work, such as part-time/*pato* work, and of women themselves as workers, and third, the allocation of domestic work to women through the construction of them primarily as mothers, wives and domestic workers. This demonstrates that the discursive power of the law plays a crucial role in organising part-time/*pato* employment in such a way as to maintain the disadvantaged position of women in Britain and Japan.



## 2. Deconstructive Practices in the Law

To conclude this study, I should like to consider a fundamental question which has been debated by many feminist legal commentators in the light of the findings of my comparative analyses of the legal construction of the part-time/*pato* employment of women in Britain and Japan. That is, is it realistic to achieve social change for women through the law? The law has brought about changes which have been much less than expected by those who campaigned for the introduction of anti-discriminatory measures and has exhibited its very limited power to promote the interests of women in a complex social context. This has led some feminists to consider the law as an ineffective and relatively marginal means of achieving social change for women (for example, see Pascall, 1986: 32). Moreover, as Smart, Olsen and this study have demonstrated, the problem of the law goes beyond its ineffectiveness since its discursive operation actually makes a significant contribution to the production and reproduction of unequal gender power relations.

My study has demonstrated that, despite the distinct legal approaches adopted in Britain and Japan in dealing with the part-time/*pato* employment of women, the discursive construction of the gendered hierarchy both produces and legitimises the less favourable treatment of women in part-time/*pato* employment. Marked differences were observed in recent attempts to improve the position of women in part-time/*pato* employment between Britain and Japan, particularly in regard to the gender-specificity of this pattern of employment. In Britain, gender has been the central factor since the sexual equality approach was introduced into the legal

debates concerning part-time employment. On the other hand, in Japan a gender-blind approach has been maintained by handling the less favourable treatment of *pato* employees largely as a matter of balancing the treatments of two different categories of 'employees' rather than as a matter of sexual discrimination. Accordingly, the ways in which gender is handled in the legal institutions in Britain and Japan are seen as opposing; one takes gender difference into consideration and the other ignores it.

However, despite this difference, the discursive power of the law has contributed to the creation of the gendered hierarchy of employees in both countries. In Britain, the sexual equality approach focused upon the gender-specificity of part-time employment and constituted the less favourable treatment of part-time employees as a pattern of discrimination against 'women'. In doing so, the gendered identification of part-time employment and the gendered domestic position of women are reinforced and reproduced. This emphasis on gender obscures the fact that many part-time employees deserve equal treatment to their full-time counterparts not because they are women but because they perform the same work or make an equal contribution to business as their full-time counterparts during their working hours. As a result, the sexual equality approach has gendered part-time employment more explicitly as women's, while the hierarchy of full-time and part-time employees is maintained.

In Japan, although recognising the necessity of improving the position of *pato* employees, the legal institutions do not address the gender-specificity of *pato* employment in relation to the unequal treatment of these two categories of employees. This is because the legal institutions, alongside the employment institutions, have consistently adopted the view that it is of crucial importance to maintain the long-term employment commitment of formal employees and the distinctiveness of these employees. According to this view, there is a clear hierarchy of employees which legitimises maximum legal protections for formal employees and lesser ones for *pato* employees. In this context, the term “women” disappears and an impression is created that this is a matter of different categories of gender-neutral “employees”, formal and *pato* employees. However, this apparently gender-neutral construction of the hierarchy of employees is counteracted by the gender difference discourse which operates not only in employment institutions but also in the legislative context as seen in debates generated at the time of the introduction of a new piece of legislation for *pato* employees in 1993.

Comparing the situations of Britain and Japan described above, a prominent feature of the law in this area is that part-time/*pato* women employees appear to have reached an impasse since the discursive power of the law produces and reproduces hierarchical gendering regardless of approaches which either take gender difference into consideration or ignore it. This casts serious doubt on the capability of the law to improve the position of women since it becomes clear that the law is not a solution for women but a part of the wider discursive mechanism which produces and reproduces unequal gender and economic power relations in

society and in which part-time/*pato* women employees are disadvantaged. It is, therefore, unrealistic to expect the law to break down the hierarchical and gendered differentiation of employees or to resolve unequal power relations between the sexes and between employers and employees.

However, at the same time, the discursive operation of the law should be placed in a wider social context. Discursive power operates not only within the legal regime but also outside of it, shaping and reshaping complex and diverse power relations in society, including those between the sexes and between employers and employees. In fact, as this study has demonstrated, the interactive operation of discourses between the legal and employment institutions is crucial in bringing about the hierarchical and gendered differentiation of employees in society. This means that, however important the law is, it is only a part of the wider discursive operation which takes place in every institutional and individual sphere in every area of society. This suggests that it is equally unrealistic to expect problems to be solved by seeing the law as *the only* source of the problem and renouncing legal struggle. The dismissal of the law neither resolves the hierarchical and gendered differentiation of employees nor establishes equal power relations between the sexes and/or between employees and employers.

Moreover, women's rejection of an involvement in the legal struggle because of its discursive power to produce unequal gender relations raises another question, since such discursive operation takes place in any social institution or organisation. In

order to avoid stimulating discursive practices in society, should women withdraw from all of these sites of struggle? I do not believe that this is a path to redress unequal gender power relations in society. Some may argue that women can choose some of these sites of struggle and discard others according to the degree of influence upon discursive operation and/or its effectiveness in bringing about social change for women. If viewed in this way, it could be tempting to advocate that legal activity is one of those which should be discarded.

Nevertheless, I argue that the legal regime remains one of the most important sites of struggle for women. This is because the law is an important social mechanism of legitimisation associated with such notions as justice and authority, a legitimacy which is backed by the enforcement of state power. The rejection of the law or even the marginalisation of the law in women's struggles will have serious consequences since the withdrawal of women from this regime would make it easier for legal discourses which legitimise the disadvantaged position of women in society to be produced and circulated unchallenged. In considering this, although narrow concentration on legal activities should be avoided, women have no choice but to participate in legal struggle if they wish to have any impact on the power of the law to construct the subjectivity of women and the social structure in which women are disadvantaged.

In this context, I emphasise the importance of legal deconstruction as a strategy for women and their resistance against dominant discourses which legitimise unequal

gender power relations. This is not an easy task for women since there is a considerable imbalance of power between the sexes and between employers and employees, and the discursive power of the law often produces unpredictable results frequently against women's interests. However, the participation of women in the legal regime is essential in order to put forward their arguments and thereby produce competing discourses in this regime. In order to do this, it may be useful to develop legal strategies which can be seen as deconstructive practices within a specific context. Here, by deconstructive practices, I mean legal actions which may contribute to the deconstruction of hierarchical gendering which is identified above as the three elements of legal construction of part-time/*pato* women employees.

While the three elements of construction discussed above would be relevant to any legal activities of deconstruction affecting women, the emphasis and/or the ways in which this deconstruction can be pursued may differ considerably according to the distinct legal contexts where individual women participate in legal actions. Different legal approaches must be considered and assessed in terms of both the effects of deconstruction and of the promotion of specific needs and interests of diverse groups of women under different circumstances. It is important to develop flexible and targeted legal strategies based upon a clear recognition of the limitation of such strategies. Obviously, a legal strategy which is designed for a specific need or interest of a particular group of women at a specific time may not be useful for other groups of women or at a different time. However, this should not be regarded as a problem and/or failure of the law since there is little possibility of having an effective overarching strategy for all women in modern British and Japanese

societies since women cannot be considered as one undifferentiated social group only because of their sex.

The recognition of the diversity of women leads to the deconstruction of the collective identity of “women” and of the impasse created by this construction. This construction of a collective identity pressurises feminists to find a solution which serves for imaginary women and renders any legal action taken for a specific group of women a failure because of its inability to contribute to the promotion of general sexual equality for all. As a result of this impossible mission imposed upon the law, it is bound to fail women continuously, inevitably highlighting its hopeless ineffectiveness. This encourages the formation of a dangerous discourse which urges women to give up or marginalise legal struggles. In order not to fall into this trap, it is important to assess a legal strategy and its development within a specific context.

As demonstrated in this study, the legal struggle of women in part-time/*pato* employment has taken specific routes in Britain and Japan, and the deconstructive practices observed in the two countries also differ accordingly. Although the sexual equality approach in Britain or the gender-blind approach in Japan did not stop the discursive power of the law creating hierarchical gendering of full-time/formal and part-time/*pato* employment, each approach needs to be assessed in its specific legal context before being judged simply as failure and dismissed. The use of deconstruction of legal and related discourses is of great importance here.

In Britain, the sexual equality approach was introduced into the legal discussion of part-time employment under the anti-discrimination legislation and EU law while the EPCA set out the working hour qualification, excluding or treating less favourably some part-timers. The sexual equality approach provided opportunities for women who were unable to resort to the law under the EPCA. Moreover, the pursuit of this strategy can be seen as a challenge against the hierarchy of employees constructed by the EPCA and this activity resulted in the amendment of the EPCA, removing the qualification of working hours. This achievement should not be underestimated even though the reliance upon the gender difference discourse has ended in the enhancement of the hierarchical and gendered differentiation of full-time and part-time employment.

On the other hand, in Japan, while the LSL provides employment rights to both formal and *pato* employees, women in *pato* employment cannot benefit from the anti-discrimination legislation, the EEOL, since it does not contain such a concept as indirect discrimination as the British legislation does. Under this legal framework, there is no equivalent development based upon sexual equality equivalent to that seen in Britain and *pato* women employees are forced to rely upon an approach which emphasises either the sameness of formal and some *pato* employees, that is, disguised *pato* employees, or the “disproportionate” differentiation between formal and genuine *pato* employees.



Although it can be argued that women in *pato* employment in Japan would benefit from the pursuit of the sexual equality approach, it cannot be a solution in terms of the deconstruction of hierarchical gendering, as shown by the case of Britain. On the other hand, with the removal of the working hours qualification, the redeployment of a less gender-specific approach in Britain could be advocated. In this context, I wish to underline a possible deconstructive practice, focusing upon the way in which the gendered and hierarchical difference is constructed between full-time/formal and part-time/*pato* employees.

My analysis has demonstrated a crucial correlation between quantitative and qualitative difference based upon which the hierarchy between these two groups of employees is established. That is, the qualitative difference between full-time/formal and part-time/*pato* employees, represented in factors such as skill, responsibility, and commitment, is explicitly or implicitly attributed to the quantitative difference in time. By challenging this correlation of quantitative and qualitative differences it is possible to challenge the hierarchy of full-time/formal and part-time/*pato* employees. Indeed, this is the very basis of equal pay legislation in Britain. Part-time women employees should be paid on a *pro rata* basis because they do the same work, broadly similar work, or work of equal value, not because they are women.

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## APPENDIX

### Questionnaire

#### 1) About Your Staff

1-1 How many regular full-time employees do you have?

male \_\_\_\_\_ female \_\_\_\_\_

1-2 How many regular part-time employees do you have?

male \_\_\_\_\_ female \_\_\_\_\_

1-3 What are their average *contractual* working hours per week?

full-time male staff \_\_\_\_\_ part-time male staff \_\_\_\_\_  
full-time female staff \_\_\_\_\_ part-time female staff \_\_\_\_\_

1-4 Were they asked to do any overtime within past three months?  
Please tick.

full-time male staff	yes/no	part-time male staff	yes/no
full-time female staff	yes/no	part-time female staff	yes/no

1-5 How are the employees paid? Please tick.

full-time staff	part-time staff
monthly/weekly	monthly/weekly

1-6 Are there any training programmes available for non-managerial staff?

full-time staff	part-time staff
yes/no	yes/no

1-7 Do non-managerial staff have any merit payment/bonus? Please tick.

full-time staff	part-time staff
yes/no	yes/no

## 2) Personnel Management

2-1 i Do you use seasonal *temporary* staff? yes/no

ii If yes, approximately how many in the following categories?

full-time male	part-time male
full-time female	part-time female

2-2 i Are you in need to recruit more *regular* staff? yes/no

ii If yes, do you need more	regular full-time staff
Please tick.	regular part-time staff

2-3 Do you think that regular staff in the following categories are more or less likely to leave the company after only a short period of employment?

regular full-time managerial staff	more/less
regular part-time managerial staff	more/less
regular full-time non-managerial staff	more/less
regular part-time non-managerial staff	more/less

2-4 Do you have any system to measure the productivity of:

regular full-time managerial staff	yes/no
regular part-time managerial staff	yes/no
regular full-time non-managerial staff	yes/no
regular part-time non-managerial staff?	yes/no

2-5 Do you have any system to measure the quality of service which is offered to your customer by:

regular full-time managerial staff	yes/no
regular part-time managerial staff	yes/no
regular full-time non-managerial staff	yes/no
regular part-time non-managerial staff?	yes/no

2-6 Are you in general satisfied with work done by:

regular full-time managerial staff	yes/ fairly/ no
regular part-time managerial staff	yes/ fairly/ no
regular full-time non-managerial staff	yes/ fairly/ no
regular part-time non-managerial staff	yes/ fairly/ no

2-7 How do you adjust the workforce according to business fluctuation?  
Please tick as many as appropriate.

- utilise shift working hours amongst full-time workers
- bring part-time workers into the necessary business hours
- recruit seasonal temporary workers
- overtime
- others

2-8 Do you give written job particulars when you employ new staff?

full-time staff	yes/no
part-time staff	yes/no

THANK YOU VERY MUCH FOR YOUR COOPERATION.